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In The Supreme Court Of The United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did the South Carolina Court of Appeals err in holding that the award of punitive damages in this case met the requirements for due process embodied in the United States Constitution, where

(a) the court allowed the imposition of punitive damages based on a cause of action which OSCO had not elected when required to elect its remedy, and

(b) OSCO was allowed, over objection, to introduce evidence of how much money Cincinnati Insurance Company made during the 10 days the jury was required to be present; the annual investment income of the insurance company; the total assets of the company; and the "surplus" of assets over liabilities; and

(c) the trial court allowed an award of punitive damages against a Defendant whose liability was solely vicarious, when OSCO dropped any claim for punitive damages against

the local agent who was directly liable for the negligence; and

(d) there was no evidence of reckless or other wrongful conduct in connection with the allegation that Defendants failed to procure the correct insurance for OSCO; and

(e) there was no meaningful review by any appellate court?

2. Did the South Carolina Court of Appeals err in failing to grant Defendants a new trial, and thereby deny Cincinnati's right to due process under the United States Constitution, when the jury's verdict was the product of passion, caprice, bias, or prejudice as reflected by:

(a) the inconsistency of the jury's verdict, and

(b) an actual damages award by the jury that far exceeded the evidence, and

(c) counsel for OSCO being allowed to inflame the community-versus-out-of-state-insurance-company passions of the jury?

LIST OF PARTIES

Orangeburg Sausage Company (closely held corporation)	Plaintiff
R. F. Bryant and Son, Inc. (closely held corporation)	Defendant
Cincinnati Insurance Company Cincinnati is itself a wholly owned subsidiary of the Cincinnati Financial Corporation a publicly-held corporation whose shares are traded on the NASDAQ. Cincinnati Insurance Company has no non-wholly owned subsidiaries.	Defendant

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No.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CINCINNATI INSURANCE CO.,

Petitioner

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

The Petitioner, Cincinnati Insurance Company, respectfully prays that a writ of certiorari issue to review the judgment of the South Carolina Court of Appeals entered in this proceeding on September 6, 1994, rehearing denied November 6, 1994, for

which Petitioner's timely filed petition for writ of certiorari to the South Carolina Supreme Court was denied on May 9, 1995.

OPINIONS BELOW

The South Carolina Court of Appeals' opinion in this matter, Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994) and the South Carolina Supreme Court's Order denying certiorari, entered May 9, 1995, are set forth in the Appendix hereto ("App.") at pp. 1-42.

The Order of the trial court, entered May 26, 1992, denying Cincinnati Insurance Company's relevant post-trial motions is at App. pp. 43-86.

JURISDICTION

The judgment of the South Carolina Court of Appeals was entered on September 6, 1994. The Petitioner's timely filed petition for certiorari to the South Carolina Supreme Court was denied on May 9, 1995. (App. at 41). This petition is being filed within ninety (90) days of that date. This court's jurisdiction is

invoked under 28 U.S.C. § 1257. Petitioner has received a final judgment from the highest court of South Carolina from which judgment could be had and petitions this Court based on rights claimed under the Constitution of the United States.

CONSTITUTIONAL PROVISIONS INVOLVED

The Constitutional provision involved in this case is as follows:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATEMENT OF THE CASE

SUMMARY

This is a case in which a local jury rendered a verdict against an out-of-state insurance company in favor of a local employer that was clearly the result of passion and prejudice. The

courts of South Carolina, trial and appellate, have failed to restrain this outpouring of passion and prejudice, even going to the extreme of abandoning existing precedent and refusing to apply fundamental and standard safeguards against such excess. As a result, the Petitioner, Defendant below, Cincinnati Insurance Company ("Cincinnati"), has been stripped of its property contrary to the due process guaranteed by the United States Constitution.

From the outset, the case was factually and legally confusing because the court permitted the Plaintiff, Orangeburg Sausage Company ("OSCO"), to proceed simultaneously on theories of liability that were stipulated to be mutually exclusive of one another. As a result, evidence and allegations which were not relevant to the cause of action eventually elected were heard by the jury. This obviously confused the jury, which found against Cincinnati on all causes of action even though they were mutually exclusive. Even worse, the trial and appellate courts chose to sustain the punitive damages award on factual and legal grounds

relevant solely to an unelected cause of action. In this way, the trial and appellate courts not only ratified the jury's confusion and prejudice, but formalized it in direct opposition to clear standards mandated by the rulings of this Honorable Court.

On September 22, 1989, Hurricane Hugo damaged OSCO's property. A policy of insurance had been obtained by the Co-Defendant, R. F. Bryant & Son, ("Bryant"), an independent insurance agency, fifteen months prior to the loss and tendered to OSCO's vice president in charge of insurance. The policy called for different coverage limits on OSCO's various covered properties. Three months prior to the loss, Cincinnati submitted a bill reciting again the coverage provided for the scheduled properties, which OSCO paid. Four months after the loss occurred, OSCO claimed for the first time that the declarations page of its policy was faulty in that one of the insured addresses was inaccurately listed as "488 High Street." A dispute arose as to what this "mistake" meant in terms of the coverage limits for

some of OSCO's property, and this lawsuit ensued.

OSCO brought suit against Cincinnati and local independent agent Bryant setting forth three legal causes of action: (1) breach of the existing insurance contract by Cincinnati; (2) bad faith failure by Cincinnati to pay the claim as allegedly required by the existing policy; or (3) if there was no coverage under the policy, then, in the alternative, negligence by the agent Bryant in obtaining a policy with the wrong property description and limits. It was stipulated that the negligence cause of action referred solely to acts or omissions of Bryant and that Cincinnati's liability for that cause of action was strictly derivative of Bryant's actions.

The trial was bifurcated between actual and punitive damages. At the conclusion of the actual damages phase, the jury returned an award of $254,029.23 on the breach of contract claim, $250,000.00 on the bad faith cause of action, and $800,000.00 on the negligent procurement claim. The verdicts were inconsistent in that there could not logically be liability premised on having a

proper contract (breach of contract and bad faith) and on not having a proper contract (negligent procurement). The award of $800,000.00 for the negligence cause of action far exceeded any amount suggested by the evidence.

After the actual damages phase, the trial court required OSCO to elect its remedy. OSCO chose negligence and chose to proceed only against Cincinnati for punitive damages, dismissing any such claims against the local agent even though his acts alone constituted the negligence for which OSCO sought recovery.

The jury returned a punitive damages award of $1,630,000.00 against Cincinnati even though there was no evidence in the record that Cincinnati (or for that matter, Bryant) had done anything reckless or intentionally harmful. Subsequently, the trial and appellate courts sustained the verdict for punitive damages, but did so based solely on the unelected, and previously abandoned, bad faith allegations. Indeed, the appellate court went so far as to inexplicably deviate from standard appellate practice

by permitting OSCO to claim, over objection, the entire transcript as its record on appeal even though more than 75 percent of the total transcript is completely irrelevant to the negligence cause of action elected. Significantly, OSCO's brief begins with the words "this is a bad faith action" and the appellate courts have used this as a departure point to mischaracterize OSCO's appropriate means of recovery.

Moreover, the trial court permitted OSCO to present extensive financial information about Cincinnati designed to elicit the passion and bias of the jury. An "expert's" testimony was presented to focus the jury's attention on Cincinnati's earnings for the ten days during which the jury heard the case in cramped, uncomfortable surroundings which were then being aggressively renovated. The total damages awarded by the jury was $2,934,029.23, a close approximation of the $2,960,610.00 suggested by OSCO's witness as Cincinnati's earnings over the ten day period. (R. at 966).

THE CASE

In July of 1988, OSCO obtained a commercial insurance policy with Cincinnati through independent insurance agent Bryant in order to cover specific buildings and contents at certain separate locations. On September 22, 1989, OSCO sustained damage to some of its buildings and contents as a result of Hurricane Hugo. After OSCO made a claim, a dispute arose between the parties as to how much coverage the policy should have provided at these separate locations. Cincinnati maintained that OSCO's recovery was limited to the amounts recited in the policy for the specified addresses. OSCO sued, alleging breach of contract and bad faith, or, in the alternative, that independent agent Bryant had negligently and recklessly procured a policy which recited incorrect coverage limits on the scheduled property.

OSCO is a multi-million dollar family business engaged in the manufacture, processing and distribution of food products, located in Orangeburg, South Carolina, the same town in which

the trial was conducted. (R. at 437-39). Its owners have operated the business for a considerable period of time, and they are experienced business people. One of the owners, a vice-president, was specifically charged with obtaining and maintaining insurance for the corporation (R. at 370).

Bryant is an independent insurance agent in Orangeburg (R. at 613-14, 678). He sells insurance from eight companies. (R. at 678-79). He is not an employee of Cincinnati and is compensated only by commission. (R. at 613). During his several contacts with OSCO's officers, Bryant never even indicated which insurance company's policy he would use. OSCO did not request coverage with a specific company. (R. at 384-5). OSCO purchased life, health, workers' compensation and other insurance from various agents other than Bryant. (R. at 383). OSCO has never contended that agent Bryant has ever made any misrepresentations concerning the policy or its coverage limits. (R. at 45-46).

The commercial insurance policy that is the subject of this lawsuit was issued on July 1, 1988, upon the expiration of a prior policy. (R. at 360, 1019). It was understood by all parties before issuance that this new policy would need to reflect new coverage limits on more than one piece of scheduled property. (R. at 374-79). As usual, these limitations of coverage are recited in the declarations page of the policy. (R. at 1024).

OSCO received this policy in July of 1988, but its owners and managers never read the policy or the declarations page. No one from OSCO ever complained about the policy or pointed out any alleged errors prior to the Hugo loss. (R. at 480, 613).

In July of 1989 the policy came up for renewal A billing statement was sent to OSCO clearly delineating and repeating precisely the coverages depicted on the declarations page, showing the same scheduled addresses and their respective coverage limits, as had been done in 1986, 1987, and 1988. (R. at 1366, 1368, and 1370). OSCO paid the bill without any question, comment or

complaint. (R. at 360).

On September 22, 1989, nearly fifteen months after the issuance of the policy, and only three months after paying the amounts called for in the billing statement, OSCO sustained damage to food items stored in various facilities due to Hurricane Hugo and sought to recover monies from Cincinnati under the policy. (R. at 269, 274-76). Prior to this alleged loss, OSCO had never read its policy or questioned it in any way. (R. 373, 396, 468). OSCO knew, however, that it was underinsured as the day after Hugo one of the principals of OSCO called Bryant to increase its property damage limits retrospectively. (R. at 362, 386).

The policy issued clearly calls for scheduled insurance coverage at three separate locations. (R. at 1024). Four months after the hurricane, OSCO, for the first time, stated that one of the scheduled locations - 488 High Street - had never existed. Bryant and Cincinnati maintained that this is the location of OSCO's freezer building where OSCO allegedly sustained its greatest loss,

and all the experts who testified in the case agreed that this is the only reasonable way to construe the policy as it is written. (R. at 344-52, 430-33).

OSCO asserted that the policy, as written, did not reflect its request for coverage limits. (R. at 414-15, 442). The Defendants said it did. OSCO asserted that it had wanted $200,000 more coverage on the freezer building contents than is shown for 488 High Street on the declarations page. OSCO also asserted that the policy should not have had a coinsurance provision. The coinsurance provision was clearly stated in the declarations page, and had been a part of all of OSCO's policies since 1983. (R. at 991). Its policy at the time of trial, in fact, included a coinsurance provision. (R. at 470-71). All of the alleged "defects" in the policy were located in the declarations page of the policy itself and on the face of the periodic billing statement right next to the amount of premium due, which OSCO paid.

Because of the widespread damage caused by Hugo, Cincinnati sent emergency adjusters to OSCO to investigate its damage claim. Interestingly, all of Cincinnati's adjusters encountered only one other Hugo-related grievance by an insured throughout the entire state, a complaint to the State Insurance Department which was settled. (R. at 139). However, at OSCO, a coverage dispute arose due to OSCO's initial claim that its losses were the result of an off-premises power outage. When the claims adjuster informed OSCO's principals that the policy provided no coverage for off-premises power outages, he was cursed and acrimoniously told to get off their property.

Cincinnati nonetheless accepted OSCO's revised version of how its loss occurred and continued to adjust the claim. After the adjuster apportioned the loss by scheduled location, another conflict arose when, for the first time, OSCO revealed that "488 High Street" was a nonexistent address and that it objected to any of the loss being allocated to this location and to the

implementation of the coinsurance clause.

On July 12, 1990, OSCO filed and served its Summons and Complaint. The first cause of action was against Cincinnati alone and alleged breach of contract for failure to enforce the policy by providing the additional $200,000 contents coverage to which OSCO asserted it was entitled. (R. at 43-44). This cause of action presumes an enforceable contract with the policy limits advocated by OSCO. The second cause of action was against Cincinnati alone for the bad faith failure to pay under the policy the amounts OSCO alleged were due. It was stipulated by counsel that this cause of action was derivative of the breach of contract action and could not be sustained absent a finding of breach of contract. No independent acts of bad faith beyond failing to pay the amount set forth in the breach of contract action were alleged. Bad faith could not withstand an abandonment of the breach of contract action.

The third cause of action against both Defendants for

negligent procurement presumed there was no enforceable contract that provided the coverages OSCO wanted. OSCO's Complaint states the negligence cause of action as:

FOR A THIRD CAUSE OF ACTION

. . .

18. The Defendants represented to plaintiff that the policy issued by the Defendant Cincinnati would meet those needs. If the policy is found not to cover the plaintiff's losses, plaintiff will suffer $189,865.29 in uncompensated losses that it intended to insure, and that Defendants led it to believe would be insured.

19. If it is determined that the plaintiff's losses were not covered by the insurance policy in question, the defendants were negligent, careless and reckless in the following particulars:

a. in writing an incorrect address in the insurance policy in question;

b. in changing the insurance policy without notice to plaintiff;

c. in writing an insurance policy which failed to meet the plaintiff's stated requests for coverage, while leading the plaintiff to believe that

such needs had been met;

All of which are the direct and proximate cause of the plaintiff's uncompensated losses.

(R. at 45-46). OSCO stipulated that the acts of negligence complained of were solely those of Bryant and that there were no independent acts of negligence alleged against Cincinnati itself. Thus, Cincinnati's liability for negligence was totally derivative of the acts of the independent agent. (R. at 789, 828, 838).

The case came to trial before a jury in Orangeburg, South Carolina, on January 13, 1992. Cincinnati made a pre-trial motion to require OSCO to elect its remedy, given the different theories and different proofs involved. (R. at 242-244). The trial court denied Cincinnati's motion. By agreement, the trial was bifurcated between the claims for actual and punitive damages.

During the course of the actual damages phase of the trial, the court allowed, over Cincinnati's objection, testimony by Mr. Barranco, an "expert" hired by OSCO, as follows:

Q. Do insureds read through their insurance policies?

> A. Normally not. That's universally known throughout the industry, and Mr. Suggs, it is also universally known that the few insureds that do attempt to read their policy are not expected by the people in the industry to understand the policy.

(R. at 303). After the court overruled Cincinnati's objection to such testimony, Mr. Barranco quoted from a book, Insurance Company Operations, and gave commentary on it: "[a]nd to just read the one sentence that applies, it says, 'few insureds bother to read their insurance policies and the policies may spell out duties of which the insured is unaware.' That's well known in the industry, Mr. Suggs." (R. at 305-306). Another "expert" hired by OSCO, a Mr. Siver, testified that people who buy insurance know very little about it and have a very limited ability to be aware of things like coinsurance. (R. at 417).

Such testimony arouses the passion and prejudice of members of the jury against insurance companies. The clearly intended implication is that insurance companies are intentionally taking advantage of ordinary people (like the jurors) who are

helpless to defend themselves.

OSCO's President was also allowed to testify, over Cincinnati's objection, about OSCO's participation in community activities. The testimony was:

> Q. Just briefly; what kind of community activities does OSCO engage in?
>
> A. A variety of activities. We have people to come and ask us to do certain things for different organizations, and of course we're committed to the community. It's a wide variety of community commitment; Voc Hab functions, Bar-B-Que for various organizations, Heart Fund, etc. There's not any way I could list the number of activities that we have participated in for the community.

(R. at 439-40).

In his closing argument, OSCO's counsel built on this testimony and furthered the parochial appeal, the clear intent of which was to excite the prejudice of the jury. He argued that Cincinnati had harmed the whole town of Orangeburg.

> So it's important to OSCO, this case, and the case is important to the community. This is not just

> about OSCO. OSCO was employing 30 people in this community before this happened to them, and now they're not. Thirty jobs have been lost because their claim couldn't get paid. What they paid their premiums for didn't get paid. Now, we're not Michelin; we don't bring in 300 jobs or 3,000 jobs, but every job is important to the community. This case is important to the State because what you do in this case is going to be known to Cincinnati Insurance Company and to every other insurance company.

(R. at 836). At the end of his argument he returned to this Orangeburg versus Cincinnati theme exhorting the jury to "give this community back Orangeburg Sausage Company." (R. at 869).

After counsel's passion-provoking argument, the jury returned an actual damages verdict for OSCO on all three legal causes of action. (R. at 5, 36-37). It awarded $800,000.00 in actual damages on the negligence cause of action, $254,079.73 on the breach of contract cause of action, and $250,000.00 for the bad faith cause of action. (R. at 36-37).

For the jury to return an award of actual damages on the negligence cause of action -- i.e., for <u>not</u> obtaining the contract

OSCO desired -- and on the breach of contract and bad faith causes of action -- i.e., for obtaining but not honoring the contract OSCO desired -- defies logic and reason. Such an internally inconsistent verdict is evidence of passion, bias, or prejudice.

The size of the award for actual damages for negligence is additional evidence of prejudice, passion, or bias. There is no testimony in the record of actual damages in the amount of $800,000. The President of OSCO "estimated" damages of $750,000 (R. at 455), but the trial court later, in granting a remittitur to $595,215, held that there was "little, if anything, to substantiate" the testimony as to $750,000 in damages. (App. at 12). The jury, therefore, awarded actual damages for negligence in an amount far above what the evidence supported.

Immediately after the verdict for actual damages was rendered, Cincinnati moved for a new trial on the basis that the verdict was based on passion, caprice, or prejudice. (R. at 940, 944). Within the ten days allowed by the court for post-trial

motions, Cincinnati moved for a judgment notwithstanding the verdict or, alternatively, for a new trial based on the same grounds. (R. at 61-64, 65, 68, 76, 79-80, 93-96, 101-102, 128-29, 159-161). Cincinnati also recited these grounds in its appeal to the South Carolina appellate courts. (Brief for Appellant Cincinnati at 31-33) (Reply Brief for Cincinnati at 15-17) (Pet. for Rehearing by Cincinnati at 31-33). The issue was likewise presented to the South Carolina Supreme Court in Cincinnati's Petition for Certiorari to that court. (Pet. at 40-42, 44-45).

After the jury returned the actual damages verdict, the court required OSCO to elect its remedy.[1] OSCO elected the negligence cause of action which, as stated in the Complaint, was based on there not being coverage for OSCO's damages under the insurance policy. (R. at 45).

---

[1]Cincinnati had earlier renewed its motion that OSCO be required to elect its remedy, (R. at 513-518), but the court held that OSCO would not be required to make an election until the verdict was returned.

Though OSCO had specifically stated that the cause of action in negligence against Cincinnati was completely derivative of Bryant's conduct, (R. at 789, 828, 838), OSCO released Bryant from any liability for punitive damages prior to the punitive damages phase of the trial. (R. at 490, 946-47, 950-951). Releasing the local agent before the question of punitive damages was presented to the jury was another of OSCO's actions to encourage the jury to direct its bias and prejudice against the vicariously liable, but out-of-state, insurance company.

Despite requiring OSCO to elect its remedy, the trial court failed to limit the jury's consideration to the evidence relevant to the elected remedy. The court thereby allowed punitive damages to be assessed for both the negligence and the bad faith causes of action, (R. at 956-959), even though bad faith was not elected nor consistent with the allegations of negligence. Cincinnati immediately objected to any mingling of the negligence and bad faith actions. (R. at 956-959). Cincinnati again objected right

after the court's charge to the jury, (R. at 975), and specifically objected under Amendment XIV to the United States Constitution. (R. at 975-976). Over Cincinnati's objection, the court allowed the jury to consider irrelevant evidence, which pertained only to the bad faith claim, in considering punitive damages. (R. at 956-959, 968-972). In reviewing and approving the award of punitive damages of $1,630,000, both the trial court (App. at 56) and the South Carolina Court of Appeals (App. at 21-22) cited only actions that were relevant to the unelected bad faith claim. The trial court cited as evidence supporting the punitive damages against Cincinnati the following: disregarding evidence that OSCO's loss was from water damage; refusing to pay the undisputed portions of the claim for eight months; violating portions of its own claims manual; demanding documentation on a piecemeal basis for months after the loss; taking five months to advance the position that the freezer building had only $30,000 in contents coverage; refusing to consider OSCO's very viable position on the incorrect address;

and requiring, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address. (App. at 56-57). A perusal of this proffered justification for punitive damages reveals that none of the cited reasons pertains to allegations surrounding the agent's obtaining the policy. All of the proffered rationale depends on there being an enforceable contract between OSCO and Cincinnati, which directly contradicts OSCO's negligence claim. The review by the South Carolina Court of Appeals is practically a verbatim recasting of the trial court's Order. (App. at 21-22). The actions it cites sustaining an award of punitive damages are the same as those cited by the trial court. Like the trial court, the appeals court cites no actions that allege misconduct or recklessness by Cincinnati in procuring or issuing the policy.

Prior to the punitive damages phase of the trial, Cincinnati moved to strike punitive damages specifically because there was "no evidence of reckless or willful conduct." (R. at 950). After

the jury charge on punitive damages, when the court was seeking any exceptions, additions, or objections, Cincinnati objected on constitutional grounds. (R. at 975-76). In its post-trial motions, Cincinnati reiterated its objection that there was no evidence that would warrant the imposition of punitive damages. (R. at 63, 92, 131). Cincinnati brought the deficiency-of-evidence issue up on appeal, (Brief for Cincinnati at 22-26), and in its petition for certiorari to the South Carolina Supreme Court (Pet. for Cert. for Cincinnati at 30-33).

The trial court allowed OSCO to present to the jury, in the punitive damages phase, extensive financial information about Cincinnati. OSCO was allowed to present, over objection, Cincinnati's total assets; net worth; and, again over objection, annual and daily earnings. (R. at 963-965). The latter information, moreover, was presented in such a way as to invite the jury to respond in anger at their having to spend ten days at the trial. (R. at 953-54; 966). OSCO's counsel implicitly invited the

jury to assess damages against Cincinnati in the amount the company earned during the ten days of trial. The trial had been conducted in a cramped atmosphere during renovations to the courthouse. OSCO's counsel told the court before the testimony that "I'm going to ask [Dr. Wood] to multiply [Cincinnati's daily earnings], by the number of days we've been here at trial." (R. at 953). The court, over Cincinnati's objection, gave its full approval to that prejudicial evidence, as shown from the following extract.

The court:	If the question is will I allow him to multiply -- How many days have we been here?
Mr. Suggs:	Ten
The court:	Ten times that number? Yes, I'll let that go.

(R. at 954). Such evidence can have no purpose except to arouse the anger and resentment of the jury. It certainly is not probative regarding any conduct of Cincinnati that would merit an award of punitive damages.

Within the ten days allowed by the court, Cincinnati made post-trial motions for judgment notwithstanding the verdict or for a new trial (R. at 61-69); to vacate or for a new trial nisi remittitur of actual damages (R. at 126-27); for a post trial review of punitive damages and to vacate or for a new trial nisi remittitur of punitive damages (R. at 131-132). In response to Cincinnati's motions, and similar motions from Co-Defendant Bryant, the trial court, by Order Regarding Post-Trial Motions, (App. at 43-86), granted Defendant's motion for a new trial nisi remittitur as to actual damages and denied all other post-trial motions. Under the court's holding, unless OSCO consented to a reduction in the amount of actual damages for negligence to $596,216, the Defendants would be entitled to a new trial. OSCO did consent to the remittitur.

Cincinnati and Bryant timely appealed the court's Order to the Supreme Court of South Carolina. The case being assigned to the South Carolina Court of Appeals, that court, after briefing by

all parties, heard arguments on October 4, 1993. The appeals court made its decision and issued its opinion on September 6, 1994; it denied Cincinnati's petition for rehearing on November 9, 1994. Cincinnati timely petitioned the South Carolina Supreme Court for certiorari, which petition was denied on May 9, 1995. (App. at 41). This petition followed.

In this petition, Cincinnati is seeking redress under the XIV Amendment to the United States Constitution for violations of its right to due process in the trial and appellate courts. The federal due process issue regarding punitive damages was raised initially in Cincinnati's Amended Answer (R. at 59); repeatedly in the trial court (R. at 950, 956-959, 975-976); in Cincinnati's post-trial motions (R. at 63, 92, 131); and in its state court appeal. (Brief for Cincinnati at 22-26; Pet. for Cert. at 30-33). Cincinnati raised the federal due process issue regarding actual damages right after their imposition (R. at 940, 944), in its post-trial motions (R. at 61-69, 79-80, 101-102, 127, 159-160), and in its state appeal.

(Brief for Cincinnati at 31-33; Reply Brief for Cincinnati at 15-17; Pet. for Cert. for Cincinnati at 31-33).

PROCEEDINGS BELOW

On July 12, 1990, OSCO filed its Complaint in the Court of Common Pleas for the County of Orangeburg, South Carolina. The Complaint was served on Cincinnati by letter to the State Insurance Commissioner on July 23, 1990. Cincinnati filed and served its Answer on September 24, 1990. It filed an Amended Answer on October 19, 1990. The case came to trial in Orangeburg, South Carolina on January 13, 1992. Verdicts as to actual and punitive damages were reached on January 22, 1992.

Defendants on January 31, 1992, filed post-trial Motions for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, to Vacate or for a New Trial Nisi Remittitur of Actual Damages, and for Post-Trial Review of Punitive Damages and to Vacate or for New Trial Nisi Remittitur of Punitive Damages. By Order of May 26, 1992, the trial court granted the

Motion for New Trial Nisi Remittitur as to Actual Damages unless OSCO consented to a remittitur of the actual damages award to $595,216.00. (App. at 43-86). All other post-trial Motions were denied. OSCO consented to the remittitur.

On June 11, 1992, Cincinnati filed a Motion to Reconsider the Order Regarding Post-Trial Motions pursuant to Rules 59(e) and 60(a) of the South Carolina Rules of Civil Procedure. The Motion was denied on June 25, 1992. (R. at 34-35).

Cincinnati's Notice of Intent to Appeal the May 26, 1992 "Order Regarding Post-Trial Motions" and the Order denying the Rule 59(e) and 60(a) Motion was filed on June 29, 1992. Cincinnati filed an Amended Notice of Appeal on June 30, 1992, appealing the verdict dated January 22, 1992, the May 26 "Order Regarding Post-Trial Motions," and the Order denying the Rule 59(e) and 60(a) Motion.

The case was assigned to the South Carolina Court of Appeals. After briefing, oral argument was conducted before that

court on October 4, 1993. The court issued its decision, Orangeburg Sausage Co. v. Cincinnati Ins. Co., 450 S.E.2d 66 (S.C. Ct. App. 1994), on September 6, 1994. (App. at 1). On September 21, 1994, Cincinnati petitioned the South Carolina Court of Appeals for a Rehearing. The petition was denied on November 9, 1994.

On December 9, 1994, Cincinnati petitioned the South Carolina Supreme Court for a Writ of Certiorari. This petition was denied on May 9, 1995. (App. at 41).

ARGUMENTS

It is a staple of due process jurisprudence that a party to litigation is entitled to fair process. Holt v. Virginia, 381 U.S. 131 (1965) (a fair trial in a fair tribunal is a basic requirement of due process). While precise definition of the process required to meet Constitutional imperatives is elusive, it has been held by this Court that the "state owes to each individual the process which in light of the values of a free society, can be characterized as due."

Boddie v. Connecticut, 401 U.S. 371, 380 (1971). The values of a free society change over time, but one value that has endured for centuries is that damage awards based on passion or prejudice in the jury should not stand. See Honda Motor Co. v. Oberg, 114 S. Ct. 2331, 2336-2338 (1994) (survey of cases, including Fabrigas v. Mostyn, 2 Black. W. 926, 96 Eng. Rep. 549 (C.P. 1773), citing judicial review of damages for evidence of prejudice or passion). This Court, moreover, held Oregon's process to be Constitutionally-deficient in large part because there was no provision for judicial review of punitive damages for passion or prejudice. Honda Motor Co. v. Oberg, 114 S. Ct. at 2340-41.

Review by this Court is sought in this case because the State of South Carolina provided process that did not protect an out-of-state insurance company from the intentionally-aroused passion and prejudice of a local jury. This is a case that fulfills the potential, recognized by the court in Honda Motor Co. v. Oberg, that "juries will use their verdicts to express biases against

big businesses, particularly those without strong local presences." 114 S. Ct. at 2341.

In this case a local South Carolina jury vented its anger and bias against an Ohio insurance company in its award of punitive damages and in its award of actual damages. There are numerous indicia that passion and prejudice were involved in the jury's verdicts. The trial and appellate courts of the State failed to intervene to prevent this deprivation of due process. Further, by holding that OSCO could collect punitive damages on the unelected bad faith cause of action, these courts made an error of law that deprived Cincinnati of its Constitutional right to due process.

I. THE SOUTH CAROLINA COURT OF APPEALS ERRED IN HOLDING THAT THE AWARD OF PUNITIVE DAMAGES MET THE REQUIREMENTS FOR DUE PROCESS EMBODIED IN THE UNITED STATES CONSTITUTION, WHERE

A. THE COURT ALLOWED THE IMPOSITION OF PUNITIVE DAMAGES BASED ON A CAUSE OF ACTION WHICH OSCO HAD NOT ELECTED WHEN REQUIRED TO ELECT ITS REMEDY.

Having received actual damage verdicts on its three legal causes of action -- breach of contract, bad faith, and negligent procurement -- OSCO was finally required by the court to elect its remedy. OSCO eschewed the breach of contract and bad faith causes of action and selected the negligence remedy. Actual damages were, therefore, awarded only for the negligence cause of action. Stated another way, OSCO was awarded actual damages against Cincinnati and Bryant on its allegations that Bryant had not provided a contract that covered OSCO's losses. Under the common law of South Carolina, for a party to recover punitive damages it must receive actual damages on the same cause of action. Dowling v. Home Buyers Warranty Corp., 428 S.E.2d 709 (S.C. 1993). Courts in other jurisdictions have held similarly. Thorne v. Contee, 565 A.2d 102, 112 (Md. Ct. App. 1989) cert.

denied 569 A.2d 643 ("there must be an award of some compensatory damages under the count wherein punitive damages are claimed before there can be an award of punitive damages thereunder.")

Though OSCO chose the actual damages accruing from Bryant's not obtaining coverage, the court allowed punitive damages based on Cincinnati's alleged bad faith failure to pay under this original contract. Cincinnati is thus held liable for failing to provide the right agreement -- and then punished for its failure to pay under an agreement that did not provide coverage.

That Cincinnati was punished for conduct irrelevant to the negligence cause of action is apparent from the trial and appellate court's reasons recited as the bases for awarding punitive damages and from the Court of Appeals' direct statement that, "Cincinnati contends that, because OSCO elected to recover under its negligence cause of action, the jury should have considered only the evidence supporting the negligence claim during the punitive

damages phase of the trial. We disagree." (App. at 36-37).

In a "Bad Faith" section of its Order denying the post-trial motions, the trial court gives a further explanation of what it considers bad faith, all of which is based on the existence of an enforceable contract providing coverage. The court said:

> The contract listed $230,000 of contents coverage at 597 High Street, the uncontradicted address of OSCO's business and the address which had previously been used to insure the contents of the freezer building. Cincinnati, when it investigated the address issue, confirmed that there was no such address as 488 High Street and that OSCO had never used any address other than 597 High Street. At that point, the evidence may clearly be interpreted to warrant a determination that Cincinnati had no reasonable grounds to continue to insist that the freezer building alone was in fact 488 High Street. Nonetheless, that is the position it steadfastly took.
>
> Further, there is strong evidence that Cincinnati acted unreasonably and in conscious disregard for the rights of OSCO in adjusting the claim, including not only the positions it took, but the delays and methods used. There is abundant evidence that Cincinnati knew early on that it owed the claim, that it changed its position regarding reasons for denying the claim, that it unreasonably delayed payment of undisputed parts of the claim, and that

> its own investigation disclosed no valid reason for denying the claim. In other words, there is abundant evidence of bad faith.

(App. at 70-71). Every element of this discussion, from the word "contract" in the first sentence through the phrase "denying the claim" in the penultimate sentence, is premised on the unelected breach of a valid, enforceable contract.

The court's charges to the jury regarding bad faith, (R. at 895-899), make clear that there must be a valid contract as a prerequisite to a bad faith claim. In citing the elements of such a cause of action, the court cited the first three requirements as:

> (1) the existence of a mutually binding contract of insurance between the plaintiff and the defendant; (2) a refusal by the insurer to pay benefits under the contract; (3) that that resulted from the insurer's bad faith or unreasonable action and breach of the implied covenant of good faith and fair dealing arising on the contract.

(R. at 896) (emphasis added).

The conclusion is inescapable that the trial and appellate courts of South Carolina have, contrary to their own precedent,

allowed actual damages on one set of facts and one cause of action and punitive damages based on a directly contradictory set of facts and different cause of action.

Allowing such a procedure betrays a lack of understanding regarding the effect of an election of remedies. This Court has stated that:

> Where two inconsistent. . .claims are presented to the choice of a party, by a person who manifests the clear intention that he should not enjoy both, then he must accept or reject one or the other; and so, in other words, that one cannot take a benefit under instrument and then repudiate it.

Peters v. Bain, 133 U.S. 670 (1890); See also, United States v. Oregon Lumber Co., 260 U.S. 290, 294-95 (1922) ("remedies. . .were inconsistent, since the first was founded upon a disaffirmance and the second upon an affirmance of a voidable transaction).

The South Carolina Supreme Court has held similarly in Thompson v. Watts, 316 S.E.2d 393, 395 (S.C. 1984), that:

> Thompson is seeking in one cause of action,

> rescission of the contract of sale and return of his consideration, and in the other, affirmance of the sale and actual and punitive damages, two inconsistent remedies. While we agree Thompson may properly bring suit alleging both a securities violation and common fraud and deceit, he must seek consistent remedies as in Bradley[Bradley v. Hullander, 222 S.E.2d 283 (S.C. 1976)]. Thus, once Thompson pursued his fraud and deceit action, he elected to affirm the contract and is barred now from seeking to repudiate the contract and recover his consideration.(emphasis added).

In the case at hand, in electing the negligence cause of action, OSCO disaffirmed the insurance contract. Allowing OSCO to proceed against Cincinnati for punitive damages on the unelected bad faith cause of action is to affirm the contract. This is contrary to the historic common law and to the specific holdings of this Court and the South Carolina Supreme Court. This Court "has not hesitated to find proceedings violative of due process where a party has been deprived of a well-established common law protection against arbitrary and inaccurate adjudication." Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2333 (1994) citing Tumey v. Ohio, 273 U.S. 510 (1927). Ironically, the state appellate court

ruled that the insurance contract was reasonably ambiguous. Under South Carolina law, had OSCO sought its remedy for bad faith failure to pay insurance benefits, this alleged ambiguity would have barred recovery. Poston v. National Fidelity Life Ins. Co., 399 S.E.2d 770 (S.C. 1990). However, when unfettered by the law of bad faith and simply floating free as "matters to be considered," the South Carolina court has permitted a recovery for bad faith actions, though not elected, which would have been barred had the bad faith cause of action been elected.

B. OSCE WAS ALLOWED, OVER OBJECTION, TO INTRODUCE EVIDENCE OF HOW MUCH MONEY CINCINNATI INSURANCE COMPANY MADE DURING THE TEN DAYS THE JURY WAS REQUIRED TO BE PRESENT; THE ANNUAL INVESTMENT INCOME OF THE INSURANCE COMPANY; THE TOTAL ASSETS OF THE COMPANY; AND THE "SURPLUS" OF ASSETS OVER LIABILITIES.

This Court has recognized that the "presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses,

particularly those without strong local presences." Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2340-41 (1994). In this case, the only testimony presented in the punitive damages phase of the trial was directed at the financial position of Cincinnati. The singular focus of the punitive damages phase was, therefore, solely on the wealth of Cincinnati. OSCO asked its "financial expert," Dr. Wood, to "multiply [Cincinnati's daily earnings] by the number of days we've been here at trial," (R. at 953-54, 965-66), over the objection of Cincinnati that such testimony was prejudicial.

At the time this testimony was allowed, the court and the parties knew the jury was tired and growing impatient at still being in court. At 6:00 p.m. on Friday, January 22, 1992, when the jury was brought back into the courtroom after the argument before the court about Dr. Wood's testimony, the court said to the jury, "Ladies and gentlemen, the proceeding is not [quite] over... [D]on't worry; we're not going another ten days." (R. at 960).

After Dr. Wood testified but before the verdict form was

sent back to the jury, Cincinnati moved for a mistrial as to punitive damages because of this testimony in the context of the jury's exhaustion. The following colloquy occurred:

> Mr. Sweeny: . . .we move for a mistrial in regard to punitive damages on the grounds of the prejudicial question about the ten days we've been here in trial. I think it's obvious to all of us that the jury is very tired. It's after six o'clock on the tenth day of trial. One of the jurors actually bumped his head against the panel when he heard he might have to spend another ten minutes here.
>
> The court: I think he's been doing that since day five, Mr. Sweeny.

(R. at 976-77).

The jury returned its punitive damages award at 7:00 p.m. on Friday, January 22, 1992. (R. at 978). Thus, in less than an hour OSCO presented Dr. Wood's testimony; the court instructed the jury regarding punitive damages; the court considered objections to the charges on punitive damages; and the jury deliberated such damages. In the atmosphere of impatience and the jury's apparent exhaustion, the testimony regarding

Cincinnati's ten-day earnings was particularly prejudicial. Such testimony could have no purpose or effect other than to arouse invidious emotions.

OSCO was also allowed to introduce Dr. Wood's testimony as to Cincinnati's total assets, including a chart displaying the figures, for the years 1989 and 1990, (R. at 963-64); the "surplus" of the Company, or its net worth, (R. at 964-65); and the net annual investment income for 1989 and 1990, (R. at 965). The sums in each case were large: total assets in 1989 and 1990, respectively, of $1,597,872,875 and $1,660,107,922; "surplus" in 1989 and 1990, respectively, of $494,000,000 and $476,000,000; and net investment income in the same two years of $92,012,974 and $108,062,277. These large figures and the repeated recitation of them were intended to prejudice the Orangeburg jury against the big Ohio insurance company, which was without a strong local presence. The potential for bias through such testimony, recognized in Honda Motor Co. v. Oberg, 114 S.Ct. at 2340-41,

came to full bloom here. This South Carolina Plaintiff did indeed "enjoy a windfall because [it had] the good fortune to have a defendant with a deep pocket." Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991).

C. THE TRIAL COURT ALLOWED AN AWARD OF PUNITIVE DAMAGES AGAINST A DEFENDANT WHOSE LIABILITY WAS SOLELY VICARIOUS, WHEN THE PLAINTIFF, PRIOR TO SENDING THE MATTER TO THE JURY, DROPPED ANY CLAIM FOR PUNITIVE DAMAGES AGAINST THE LOCAL AGENT WHO WAS DIRECTLY LIABLE FOR THE NEGLIGENCE.

OSCO stipulated that its negligence claim against Cincinnati was completely derivative of its claim against the agent, Bryant. (R. at 789, 828, 838). OSCO thereby conceded that any liability that Cincinnati had was strictly vicarious.

In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, (1991), this Court held that the award of punitive damages based on vicarious liability is not per se unconstitutional. In Haslip, Lemmie C. Ruffin, Jr., while acting as an agent for Pacific Mutual

Life Insurance Company ("Pacific Mutual") intentionally defrauded four employees of Roosevelt City, an Alabama municipality, one of whom was Cleopatra Haslip. The four employees filed suit against Ruffin, individually and as a proprietorship, and Pacific Mutual. At trial, the jury returned a general verdict for Haslip of $1,040,000, at least $840,000 was probably for punitive damages. Haslip, 499 U.S. at 7, n. 2. The jury's verdict for punitive damages was directed at both the agent, Ruffin, and Pacific Mutual. Pacific Mutual appealed the punitive damages award through the Alabama courts and to this Court, which affirmed the award.

The key difference between Haslip and the case at hand is that in Haslip the directly liable tortfeasor was held liable for punitive damages along with the insurance company. Here the sole direct tortfeasor, Bryant, was released by OSCO from any liability for punitive damages before the case was turned over to the jury. (R. at 490, 813). Thus, the case was directed solely at

the big, out-of-state insurance company during the punitive damages phase of the trial.

By releasing the sole actual tortfeasor from any possibility of liability for punitive damages, and then holding the purely vicarious tortfeasor liable for very large punitive damages, the concept upon which punitive damages are based is turned on its head. The jury charge approved by this Court in Haslip stated the purpose of punitive damages as "'to punish the defendant' and 'for the added purpose of protecting the public by [deterring] the defendant and others from doing such wrong in the future.'" 499 U.S. at 19.

The punitive damages in the case at hand do not punish the only wrongdoer, as the only basis for liability was Bryant's inserting an incorrect address in an application for insurance. It is very hard to visualize how an insurance company in Ohio could supervise an independent agent in Orangeburg, South Carolina, such as to preclude inaccuracies in local addresses in South

Carolina. It is equally difficult to conceive how South Carolina can impose essentially a criminal penalty on an Ohio insurance company when it has provided an insurance policy as requested by a South Carolina agent.

The deterrent function of punitive damages similarly fails in this situation. No insurance company can possibly be deterred from inserting an incorrect address in a policy as the issuing company is completely dependent upon the information provided by local agents. There is, moreover, no evidence that Bryant inserted the incorrect address in the policy either intentionally, willfully, or recklessly. If Bryant, the responsible party, could not be held liable for punitive damages in this case, Cincinnati should similarly not be held liable for such damages when Cincinnati's liability for negligence is completely derivative of Bryant's. Such an award is at best arbitrary and capricious and at worst is the intended result of bias created against an out-of-state insurance company.

D. THERE WAS NO EVIDENCE OF RECKLESS OR KNOWINGLY WRONGFUL CONDUCT IN CONNECTION WITH THE ALLEGATION THAT CINCINNATI AND BRYANT FAILED TO PROCURE THE CORRECT INSURANCE FOR OSCO.

The trial and appellate courts have consistently failed to appreciate the implications of OSCO's election of its negligence remedy. OSCO's claim in negligence is stated conclusively in its unamended Complaint, as recited supra, p. 16. OSCO's negligence cause of action unequivocally and clearly claims that Cincinnati and Bryant failed to provide a contract of insurance that provided coverage. Given OSCO's election, it has received an award of actual damages that accrue from Bryant and Cincinnati failing to provide the requisite insurance.

If punitive damages are to be assessed against Cincinnati, they must be assessed for conduct related to and consistent with a failure to provide the requisite coverage. That is not what the trial court did; it allowed the jury to "evaluate the conduct," (R. at 959, 968-972), without reference to any specific cause of action. The

"conduct" that the court allowed to be punished was, therefore, simply free-floating, dissociated from any specific cause of action. The jury was thereby allowed to punish Cincinnati for failing to settle under the contract -- after they have been assessed actual damages for not providing this contract. If OSCO had been required to elect its remedy earlier, as Cincinnati requested, none of the irrelevant evidence would have been admissible. Having knowingly allowed evidence irrelevant to the negligence claim to come in for the duration of the trial, the trial court was under an obligation, sV sponte, after the election, to limit the jury's consideration to the evidence relevant to the elected remedy. Cincinnati did attempt to have the court limit consideration to matters that did not derive from the contract, (R. at 958-59), but the court declined to do so.

Considering punitive damages on the negligence cause of action alone, as the trial court should have done, the record is devoid of evidence that Cincinnati or Bryant acted recklessly,

willfully, or intentionally in failing to obtain proper insurance. OSCO's counsel's closing argument did not recite a single reckless or willfully malicious act by Bryant or Cincinnati regarding the procurement of insurance. (R. at 834-869). The trial court's Order denying the Post-Trial Motions similarly fails to recite any reckless or malicious conduct associated with the negligence cause of action. (App. at 43-86). The South Carolina Court of Appeals' opinion simply repeats the trial court's findings. (App. at 1-40).

With no evidence of reckless or malicious conduct regarding the failure to obtain the proper insurance policy, the only reasonable conclusion is that the punitive damages were awarded solely on irrelevant evidence. Cincinnati is thereby punished arbitrarily. It is punished for not paying "reasonably" under a policy of insurance at the same time it is held liable in actual damages for not obtaining said policy.

This Court has made the point that there is not an absolute, bright threshold at which punitive damages become excessive,

either in terms of the dollar amount of such damages or at any particular multiple of actual damages. TXO Prod. Corp. v. Alliance Resources Corp., 113 S.Ct. 2711 (1993). The Court has resolutely affirmed, however, that the reasonableness of punitive awards "enter[s] into the constitutional calculus." 113 S.Ct. at 2720, quoting Haslip, 499 U.S. at 18. Grossly excessive awards of punitive damages are in substantive violation of the Due Process Clause. Id. Based on the dearth of evidence as to reckless or malicious conduct in failing to obtain the requisite insurance coverage, the award of punitive damages in this case was "grossly excessive." Here, the punitive damages do not bear a reasonable relationship to the compensatory damages. Though the dollar amount of punitive damages was slightly more than twice the actual damages awarded by the jury, the awards were made on mutually exclusive premises. Such a contradiction in the underlying bases precludes any reasonable relationship between compensatory and punitive damages, regardless of the numbers

involved.

There is, moreover, little likelihood of future damage from conduct of the nature for which Cincinnati was found liable. Clearly, there is no incentive for insurance companies or agents to write insurance coverage for wrong addresses. Incorrect information on policies can lead to undercharges of premiums as easily as overcharges. In the case at hand, e.g., Cincinnati was collecting lower premiums on a policy having a coinsurance clause, which OSCO said after the hurricane that it did not want. (R. at 417-423).

The trial court addressed the issue of harm likely to result not from Cincinnati's failure to obtain insurance, but on the irrelevant basis that Cincinnati withheld money due under an insurance contract. It said:

> That is a course of conduct which certainly must be stopped with regard to the insurance industry, and the jury could certainly feel that way that a clear and convincing showing has been made. Mr. Suggs alluded to the problem in his closing argument of what the result would be if we allowed insurance

> companies to just hold onto money for an inordinate period of time that was legitimately due under a claim.

(R. at 983) (emphasis added). The court is thereby justifying the punitive damages award based on a premise in direct conflict with that upon which actual damages were awarded.

E. WHERE THE SOUTH CAROLINA APPELLATE COURTS HAVE FAILED TO CONDUCT A MEANINGFUL REVIEW OF THE PUNITIVE DAMAGE AWARD.

In Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991), the Court stressed as a key procedural component of due process the availability of a meaningful review of punitive damages awards by both the trial and appellate courts. See also Honda Motor Co. v. Oberg, 114 S.Ct. 2331, 2335 (1994). The stated purpose of such review is to impose a "sufficiently definite and meaningful constraint on the discretion of the fact finder." Haslip, 499 U.S. at 22.

After the Haslip opinion was issued, the South Carolina Supreme Court addressed the issues of the award and review of

punitive damages. Gamble v. Stevenson, 406 S.E.2d 350 (S.C. 1991). The South Carolina court construed Haslip very narrowly, stating that while the case held that Alabama's scheme for the award and review of punitive damages met constitutional requirements, it gave no guidance as to whether other procedures were constitutionally sufficient. Gamble, 406 S.E.2d at 353.

The South Carolina Supreme Court, therefore, interpreted Haslip not to require a strong appellate review of punitive awards. It stated:

> The amount of damages, actual or punitive, remains largely within the discretion of the jury, as reviewed by the trial judge. [citations omitted]. We adhere to the precedent that this court's review is limited. . .Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this court to set aside the award.

Gamble, 406 S.E.2d at 355 (emphasis added). Under South Carolina law, moreover, a trial court abuses its discretion only when it makes an error of law, or when its ruling, based on factual considerations, is without evidentiary support. Fontaine v. Peitz,

354 S.E.2d 565 (S.C. 1987); Renney v. Dobbs House, 274 S.E.2d 290 (S.C. 1981). The phrase "without evidentiary support" has been interpreted by the state supreme court to mean "wholly unsupported by the evidence." Folkens v. Hunt, 387 S.E.2d 265 (S.C. 1990) citing South Carolina Dep't of Highways and Pub. Transp. v. Mooneyham, 269 S.E.2d 329 (S.C. 1980). In the latter case, the state supreme court quoted South Carolina State Highway Dep't v. Clarkson, 226 S.E.2d 696 (S.C. 1976):

> Our prior decisions uniformly hold that the granting or denial of a new trial upon the facts rests within the discretion of the trial judge. Most of our decisions say that such an order is not appealable; some that it is subject to review to determine whether the discretion has been abused. However, regardless of what might appear to be inconsistencies in the statement of the principles governing appellate review of the exercise of the discretion of the trial judge in such matters, the principle consistently applied in all of the cases has been that the decision by the trial judge will not be disturbed unless his finding is wholly unsupported by the evidence, or the conclusion reached has been controlled by an error of law.

South Carolina Dep't of Highways and Pub. Transp. v.

Mooneyham, 269 S.E.2d at 330 (emphasis in Mooneyham). Given the historical meaning of the term "abuse of discretion" regarding factual matters as "wholly unsupported by the evidence," when the South Carolina Supreme Court states in Gamble that punitive damage awards will be set aside only when the trial court's discretion is abused, it is not providing for meaningful appellate review.

In the case at hand, the South Carolina Court of Appeals has virtually rubber-stamped the trial court's order regarding punitive damages. Compare App. at 21-22 with App. at 56-57. Such deference to the trial court's position precludes the meaningful appellate review required by Haslip. While Cincinnati is not constitutionally entitled to a "correct" determination of a punitive damages award, it is constitutionally entitled to the conscientious application of procedures established by this Court to guard against arbitrary and capricious punishment.

II. THE SOUTH CAROLINA COURT OF APPEALS DENIED PETITIONER'S RIGHT TO DUE PROCESS

BY FAILING TO GRANT CINCINNATI A NEW TRIAL WHEN THE JURY'S VERDICT WAS THE PRODUCT OF PASSION, CAPRICE, BIAS OR PREJUDICE AS REFLECTED BY:

A. THE INCONSISTENCY OF THE JURY'S VERDICT

This case went to the jury on three causes of action: breach of contract, bad faith failure to settle, and negligent procurement. The first two causes of action were mutually exclusive from the third, as described supra at pp. 6-7, 15-17.

After the court's initial charge to the jury, Cincinnati objected that the charge failed to instruct the jury as to the mutual exclusivity of the claims. (R. at 913). The court said that he thought the matter was covered, (R. at 913), though it was not. (R. at 876-905). The court did not add any clarification of this matter in its supplementary charge to the jury. (R. at 931-933).

The jury returned verdicts for OSCO in varying amounts for all three causes of action, despite the legal inconsistency of such an award. Under the common law of South Carolina, such

inconsistency is grounds for a new trial. Johnson v. Parker, 303 S.E.2d 95 (S.C. 1983); Prego v. Hobart, 336 S.E.2d 725 (S.C. Ct. App. 1985).

The failure of the court to explain the mutual exclusivity of the claims confused the jury. If the verdicts' inconsistency was the product of confusion by the jury, the court should, under the law of South Carolina, have granted a new trial. In Johnson v. Parker, 303 S.E.2d 95, 97 (S.C. 1983), the state supreme court stated that "when a verdict is so confused that the jury's intent is unclear, the safest and best course is to order a new trial."

B. AN ACTUAL DAMAGES AWARD THAT FAR EXCEEDED THE EVIDENCE

As stated supra, p. 6, the jury returned a verdict of $800,000 for OSCO on the negligence cause of action, far in excess of any testimony regarding actual damages. The award was $204,784 higher than the amount for which the trial court found any reasonable evidence. In point of fact, had the trial court's reliance on OSCO's expert been consistently followed, the verdict

should have been reduced another $200,000 because the witness stated it would be so reduced if OSCO had received a certain loan (which it had). The jury was obviously not constrained by the evidence presented to it. There is clearly a "punitive" aspect to this award of excessive actual damages. A completely arbitrary award of actual damages does not comport with due process. The state supreme court has held that Due Process requires a fair trial before an impartial judge and unprejudiced jury in an atmosphere of judicial calm. State v. Duncan, 238 S.E.2d 204 (S.C. 1977).

Under the law of South Carolina, the trial court was required to grant a new trial absolute if the actual damages award was grossly excessive so as to be the result of passion, caprice, prejudice or some other influence outside the evidence. Allstate Ins. Co. v. Durham, 431 S.E.2d 557 (S.C. 1993); O'Neal v. Bowles, 431 S.E.2d 555 (S.C. 1993). Here, the trial court and Court of Appeals should, in reviewing the $800,000 award, have realized that some influence outside the evidence informed the

award. The trial court clearly saw that the award was outside the evidence, though he denied that the excessiveness alone was the result of passion, caprice, or prejudice. (App. at 53). The court's knowledge that the $800,000 award was based on an influence outside the evidence should, without more, have caused it to grant a new trial absolute.

Though the trial court did not believe that the excessive actual damages award was the result of passion, caprice, or prejudice, the cumulative actions of the jury should be examined. The jury found liability on all three causes of action; they found that Cincinnati acted "recklessly, wilfully, wantonly, or in conscious disregard for the rights of the Plaintiff," though there was no evidence of such conduct regarding the negligence claim; they returned a grossly excessive actual damages award for negligence, far beyond what any evidence would support; and they deliberated less than an hour to return a $1.6 Million punitive award against Cincinnati. The evidence of passion and prejudice

against Cincinnati by the jury is palpable.

C. OSCO'S COUNSEL BEING ALLOWED TO INFLAME THE COMMUNITY-VERSUS-OUT-OF-STATE-INSURANCE-COMPANYPASSIONS OF THE JURY.

As cited, supra, p. 19, OSCO's president was allowed to testify, over objection, that OSCO was "committed to the community" and manifested that commitment by a multitude of "voluntary, donated" activities to support various community organizations. OSCO's counsel also argued this "evidence" in his closing to the jury, supra, at pp. 19-20, stating that OSCO was part of "this community," i.e., the same community as members of the jury. The finale of his closing argument, was "give this community back [the] Orangeburg Sausage Company." Supra at p. 20.

This "evidence," and the argument based upon it, are devoid of any probative value as to any liability of Cincinnati or as to any damages to OSCO. Their only purpose is to appeal to the self-interest and parochial prejudice of the jury.

Arguments that appeal to the local bias of a jury are improper under South Carolina law. Norris v. Ferre, 432 S.E.2d 491 (S.C. Ct. App. 1993). The probability of prejudice from arguments to local bias are far greater in the case at hand than they were in Norris v. Ferre, in which comments were addressed to the place of residence of expert witnesses. 432 S.E.2d at 493. Here, the arguments to bias were directly addressed to seek the jury's favor for the local party, OSCO. Cincinnati was thereby directly prejudiced. This argument to local bias exacerbated the latent prejudice, recognized by this Court, Honda Motor Co. v. Oberg, 114 S.Ct. at 2340-41, and Haslip, 499 U.S. at 22, that exists against large businesses with "deep pockets." The introduction of the "dedicated-to-community evidence" and the use of such evidence in closing argument, especially the finale thereof, manifests a calculated, intentional appeal to local bias.

CONCLUSION

This is a case anticipated by the Court in Honda Motor Co.

v. Oberg. Here, a local jury used its verdicts to express its bias against a big business without a strong local presence. The latent seed of bias was brought into full flower by counsel for OSCO. Both the verdicts for actual damages and punitive damages are manifestations of this bias. The trial and appellate courts made errors of law that allowed the expression of such bias. Cincinnati has thereby been deprived of its right to due process.

A Writ of Certiorari should issue to review the holding of the South Carolina Court of Appeals in this case.

Respectfully submitted,

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OFFICE OF THE CLERK

In The Supreme Court Of The United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

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IN THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Orangeburg Sausage Company, ... Respondent,

v.

Cincinnati Insurance Company
and R.L. Bryant & Son, ... Appellants.

Appeal from Orangeburg County
William P. Keesley, Circuit Court Judge

Opinion No. 2220
Heard October 4, 1993 - Filed September 6, 1994

AFFIRMED

William O. Sweeny, III, of Sweeny, Wingate, Murphy & Barrow; C. Mitchell Brown, of Nelson, Mullins, Riley & Scarborough; I.S. Leevy Johnson, of Johnson, Toal & Battiste; all of Columbia, for appellant Cincinnati Insurance Company; Paul A. Dominick and Jay S. Masty, both of Nexsen, Pruet, Jacobs, Pollard & Robinson, of Charleston, for appellant R.L. Bryant & Son.

Kenneth M. Suggs, of Suggs & Kelly, of Columbia,

for respondent.

HOWELL, C.J.: Orangeburg Sausage Company (OSCO) sued Cincinnati Insurance Company (Cincinnati) for breach of contract, negligence,[1] and bad faith failure to pay insurance benefits following a claim for damages to OSCO's business resulting from Hurricane Hugo. OSCO also sued the insurance agent, R.L. Bryant & Son, Inc. (Bryant), for negligence in connection with the policy and claim. A jury award OSCO $800,000 actual damages on the negligence claim against both defendants, $254,029.73 against Cincinnati on the breach of contract claim, and $250,000 against Cincinnati on the bad faith claim. The jury responded to a special interrogatory and found the

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[1]*See Sullivan Co., Inc. v. New Swirl, Inc.*, ___ S.C. ___, 437 S.E.2d 30 (1993) (an insurance agent or broker must exercise good faith, reasonable skill, care, and diligence; if, because of his fault or neglect, the agent fails to procure insurance, or does not follow instructions, or the policy issued is void, or materially deficient, or does not provide the coverage he undertook to supply, the agent is liable to his principal).

defendants acted recklessly, wilfully, wantonly, or in conscious disregard for OSCO's rights.

The trial court required OSCO to elect its remedy, and OSCO chose to recover under its negligence theory. By agreement the court then held a separate hearing on punitive damages. The jury returned a verdict for OSCO for $1,630,000 in punitive damages.

Cincinnati and Bryant moved for judgment notwithstanding the verdict, new trial absolute, or alternatively new trial *nisi remittitur*. In a thorough and detailed order, the trial court granted the new trial *nisi remittitur* motion, reducing the actual damages verdict to $595,216.00. The trial court denied all other motions, and Cincinnati and Bryant appeal. We affirm.

OSCO is a corporation engaged in the wholesale and retail sale of food products. OSCO's business complex surrounds the end of a dead end street. The office, slaughtering facilities and a

retail market are on one side of the street. The freezer building is on the opposite side. Evidence showed that the entire business location has always been known as 597 High Street.

Cincinnati provided insurance on the contents of OSCO's freezers. Cincinnati wrote an initial policy covering the frozen foods products beginning July 1, 1983 and ending July 1, 1988. This policy listed "597 High Street" as the location of the insured premises. OSCO had requested coverage of $200,000.00 for the frozen food products alone, though Cincinnati wrote the policy to cover all contents.

In October 1986, three years into the initial policy, OSCO pledged its real estate and equipment located on High Street as collateral for a loan. The loan required that the collateral be covered by casualty insurance, so OSCO asked Bryant to add the necessary coverage. Bryant sent a memo to Cincinnati requesting an endorsement for the additional coverage. There was no

evidence that an OSCO representative had ever seen this document before this lawsuit. This memo, for the first time, uses the erroneous "488 High Street" as a premises address, in addition to a reference to "597." Cincinnati issued an insurance binder adding coverage of $75,000.00 for each building and $30,000.00 for the "contents - equipment" located in each.[2] The binder describes one building as 597 High Street and the other as "across street from 597." The evidence was undisputed that there is no "488 High Street" and that the freezer building would not have that designation if assigned one by the Post Office. The trial court noted that the only credible evidence was that 488 first appeared on a form which the agent prepared, without the insured's signature or review.

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[2]In evaluating this request for additional coverage, the frozen food products in the freezer building were the only contents which OSCO had previously sought to insure and those products had been insured for the preceding three years at an address of 597 High Street.

About two years later, when the initial policy expired in 1988, Cincinnati issued a one-year policy. OSCO's witnesses classified this as a renewal. OSCO sought no changes in coverage between the 1986 loan and September 1989. The application for the renewal policy used both the 597 High Street and 488 High Street addresses, but was not signed by OSCO's representatives despite a blank for its signature.

OSCO's representatives said they did not read this policy, though Bryant's witness testified that a representative of Bryant delivered it and went over it with OSCO's vice president when it was received. Two experts testified that people generally do not read their insurance contracts and, if they do read them, they do not generally understand them. The insurance company drew this contract and chose its language.

The third page inside the cover of the 1988 policy is entitled "Common Policy Declarations." OSCO is the insured and

the address is "597 High Street." The eighth page of the policy is entitled "Commercial Property Coverage Part Declarations" and is the only page which refers to a "488 High Street" address. On that page, item numbers are separately stated for the locations and the coverage, but there is no explanation of the significance of the numbering system. The record contains a "Dealers Comprehensive Form," along with the evidence that Cincinnati considered it included in the 1988 contract. This document can be read as providing coverage for products of the insured on the property located *anywhere*, provided that the property was owned, leased, or regularly used by the insured in its business.

In September 1989, Hurricane Hugo damaged OSCO's property. An off-premises power outage cut OSCO's electricity, and wind damaged OSCO's plant, allowing rainwater to contaminate the frozen food products stored in separate units of the freezer building. Cincinnati adjusted the loss at more than

$250,000.00, but disputed OSCO's claim for insurance benefits. After a delay of eight months, Cincinnati paid only slightly over $36,000.00, asserting first that OSCO had changed its position on the cause of loss after learning that the initial claim (off-premises power outage) was not covered, and second, that the largest amount of contents coverage was not the freezer building.

When the claim was not paid, OSCO promptly hired an attorney. On November 14, 1989, the attorney forwarded to Cincinnati an itemization of losses totalling $231,505.12, including $198,260.13 for contaminated frozen food in the main freezer. The attorney also made a demand for the undisputed portions of the coverage.

Several Cincinnati adjusters were involved in the claim. OSCO provided affidavits and other materials, and Jim Guth, a Cincinnati adjuster, reviewed the claim and inspected the property. Guth's report indicated Cincinnati determined OSCO's claim to be

valid and covered. Guth raised the reserves on the contents as of December 5, 1989, to $210,000.00 Dollars. On December 8, 1989, OSCO sent Guth information, along with another demand for prompt payment of the undisputed amounts. Shortly thereafter, Guth's involvement with the file was ended and yet another adjuster, Hendrickson, became involved.

OSCO supplied (or resupplied) more information on January 17, 1990. Despite Guth's findings and actions in raising the reserves, Cincinnati informed OSCO that the contents coverage for the freezer building was limited to $30,000.00. On February 20, 1990, five months and four adjusters after the hurricane, Cincinnati sent OSCO an itemization of what it would pay, reflecting the lower coverage level and imposing a coinsurance penalty.

Cincinnati claimed the only plausible reading of the 1988 policy is that the freezer building is 488 (even though the evidence

shows that Cincinnati insured it as 597 for the preceding five years) and that the contents there are insured for only $30,000.00, while the building on the opposite side of the street had $230,000.00 coverage for contents (even though there was competent evidence that the risk of loss was far greater for the freezer building). Cincinnati asserted that if OSCO's representatives had only looked at the 1988 policy, they would clearly have seen that the coverages were switched from what they should have been.

On March 6, 1990, OSCO's attorney requested, for at least the *fifth* time, that Cincinnati pay the undisputed portions of the claim. Five and one-half months after the hurricane, the request for payment of the undisputed amounts was sent to the home office and, about two weeks thereafter, the adjuster was instructed to pay the undisputed portions of the claim and to set up a meeting to try to resolve the disputed portions. Two more months passed. When

the meeting was held in May 1990, Cincinnati tendered payment for the undisputed portion of the claim conditioned upon OSCO's signing a receipt referring to losses at 597 *and 488* High Street. The non-existence of 488, however, was in dispute. Upon OSCO's refusal to sign, Cincinnati withdrew payment of the check for $41,319.93. On May 23, 1990, Cincinnati deducted approximately $5,000.00 for some reason and sent OSCO a check for $36,006.89 for the undisputed amount. Thus, eight months passed between the hurricane loss and Cincinnati's payment of $36,006.89 towards a loss which Cincinnati adjusted at $254,029.23. In fact, on February 2, 1990, Cincinnati had offered to pay a total of $75,675.51. Two years passed before the case went to trial.

I.

Cincinnati and Bryant argue the trial court erred in failing to grant its directed verdict motion on the ground that OSCO was

contributorily negligent as a matter of law for failing to read its policy. Cincinnati and Bryant argue OSCO's principals' failure to read the policy precludes them from complaining about the coverage provided by the policy, under *Doub v. Weathersby-Breeland Insurance Agency*, 268 S.C. 319, 233 S.E.2d 111 (1977). We disagree.

In *Doub*, the plaintiff sought coverage for damage to his roof caused by a snow and ice storm. Damage caused by snow or ice was specifically excluded from coverage under the policy. The plaintiff conceded the exclusion in the case was valid and brought an action for fraud and misrepresentation against the insurer. The plaintiff admitted that he never read the policy, but stated that if he had he would not have understood the scope of the exclusion. The insurer moved for a directed verdict on two grounds: (1) plaintiff had no right to rely on oral misrepresentation as to the coverage when the written terms were in his possession and

available to him; and (2) there was no evidence of a detrimental change of position in reliance on those misrepresentations. The Supreme Court noted:

> [O]ne cannot complain of fraud in the misrepresentation of contents of a written instrument in his possession when the truth could have been ascertained by his reading the instrument. One entering into a contract should read it and avail himself of every reasonable opportunity to understand its contents and meaning.

233 S.E.2d at 114. The court noted further:

> * * *Here, plaintiff had eighteen months to inform himself as to the terms, conditions and exclusions in the written contract to which he was a party. He made no effort to do so, and never read the contract. The facts here are entirely different and distinguishable from those in *Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 171 S.E.2d 486 (1969), where the insured had read the policy contract, had not understood the coverage on certain items, including the elevator, and had specifically asked if the operation of the elevator was covered, to which the defendant agent, an experienced insurance agent, had replied that it was. Here, plaintiff never read his policy and made no inquiries as to any of its specific terms and provisions, and continued to ignore the written

instrument for eighteen months.

Id. *Doub*, however, does not compel a finding of contributory negligence in the case at bar. In *Doub*, the conduct of the plaintiff was clearly a proximate cause of his injury. The policy explicitly and unambiguously excluded coverage for damage caused by snow and ice. Had the plaintiff read his policy, he would have immediately recognized the gap in his coverage, and could have purchased additional insurance.[3] Here, there was ample evidence that OSCO's employees might not have learned and understood the relevant terms and provisions of the policy by simply reading it. The policies provided by Cincinnati were inconsistent and confusing. In fact, Cincinnati's own adjuster gave the policy the same interpretation as that asserted by OSCO at trial. The

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[3]The court found the exclusion in *Doub* to be unambiguous, and not difficult to understand. The court therefore described plaintiff's assertion that he would not have understood the exclusion as "hardly credible." 114 S.E.2d at 113.

contents of the freezer building were originally insured for $200,000 under a policy covering property located at 597 High Street. The 1988 policy provided $230,000 of coverage for the contents of a building located at 597 High Street. While the 1988 policy also used the 488 High Street address, it did not describe the building at this address as the freezer building. Thus, even if OSCO had read the policy, it would not have been put on notice that the policy did not provide the coverage it had requested. Therefore, even if OSCO were contributorily negligent, there is no evidence that this negligence was a proximate cause of the loss. *See, e.g., Edwards v. Bloom*, 246 S.C. 346, 143 S.E.2d 614 (1965) (to bar recovery, negligence of injured party must have contributed as a proximate cause of the injury); *accord Gruber v. Santee Frozen Foods, Inc.*, 309 S.C. 13, 419 S.E.2d 795 (Ct. App. 1992), *cert. denied* (1993).

Moreover, OSCO relied upon the agent whom they trusted

to provide them with the same coverage they enjoyed for the previous five years under the policy. *See Riddle-Duckworth, Inc. v. Sullivan*, 253 S.C. 411, 423-24, 171 S.E.2d 486, 492 (1969)("[w]hile an insured cannot abandon all care, the rules which require one to inform himself of the terms of his contract and to take precautions for his own protection are less exacting when dealing with one's own insurance agent or broker in the procurement of an insurance contract.") After the 1983 policy was put in place, OSCO requested additional coverage, but never requested that the coverage level on the freezer building be reduced. OSCO was entitled to rely on Bryant to properly renew the insurance policy. A review of the policy by a layman would not have revealed the coverage problem.

Questions of contributory negligence and recklessness are ordinarily for the jury and only rarely become questions of law for the court. *See Tucker v. Albert Rice Furniture Sales, Inc.*, 295

S.C. 119, 367 S.E.2d 427 (Ct. App. 1988) (where there is any uncertainty as to the existence of contributory negligence, the question of whether a plaintiff is guilty of contributory negligence which will bar recovery is for the jury to determine). The question of contributory negligence becomes a question of law for the courts only when the evidence is susceptible of but a single reasonable inference. *Id.* Further, even if undisputed facts show that both parties may be guilty of negligence, "questions of negligence, proximate cause, and contributory negligence should be submitted to the jury if there is a fair difference of opinion as to whose act or acts produced or contributed to the injury complained of as a direct and proximate cause." *Republic Textile Equip. Co. of S.C. v. Aetna Ins Co.*, 293 S.C. 381, 388, 360 S.E.2d 540, 544 (Ct. App. 1987). In determining whether a plaintiff is contributorily negligent as a matter of law, the evidence of the whole case must be viewed in the light most favorable to the

party opposing the motion for directed verdict. *Tucker*, 367 S.E.2d at 429. Viewing the evidence in the light most favorable to OSCO, we conclude the trial court properly submitted the issue of contributory negligence to the jury.

Furthermore, the trial court held that even if the court could hold OSCO contributorily negligent as a matter of law in failing to read the insurance policy, the jury affirmatively found, with ample supporting evidence, that the defendants were wilful, wanton and reckless. We agree. Contributory negligence is not a defense to reckless and wilful conduct. *Ballou v. Sigma Nu General Fraternity*, 291 S.C. 140, 352 S.E.2d 488 (Ct. App. 1986). Although Cincinnati argues the issue of contributorily [sic] recklessness in its brief on appeal, the trial court refused to address it because the court held Cincinnati did not raise the issue at trial. In fact, the trial court charged the jury "[i]f you find that the defendant was reckless, willful, or wanton and that the plaintiff

was merely negligent, then your verdict must be for the plaintiff unless the defendant proves the next step, and that is that the plaintiff was contributorily reckless, willful, or wanton." Hence, the court submitted the issue of OSCO's contributory recklessness to the jury, which found in OSCO's favor.

II.

Cincinnati argues the trial court erred in failing to grant its motion for directed verdict as to punitive damages. We disagree.

The trial court conducted a separate hearing on the issue of punitive damages. OSCO called an expert witness who testified about Cincinnati's net worth, its reserves, and its earnings. Cincinnati offered no witnesses and asked only one question on cross examination. The entire punitive damages hearing lasted only minutes, though the trial court in no way restricted the parties. The parties also agreed that they would not make closing arguments in this stage of the trial, again not at the trial court's

insistence. After deliberations, the jury found OSCO showed by clear and convincing evidence its entitlement to an award of punitive damages. The jury awarded $1,630,000.00 in punitive damages, which was roughly twice the actual damages award, and 0.003 percent of Cincinnati's net worth.

The trial court conducted a post-trial review pursuant to *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991), and made findings on the record. The trial court also considered additional materials which were supplied by Cincinnati. Cincinnati filed various motions to vacate the award of punitive damages, for a new trial, and for post-verdict review of the punitive damage award. The trial court reviewed these motions in light of the requirements of *Gamble* and *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and reaffirmed its previous determination that the award of punitive damages in this instance was proper.

The trial court noted the United States Supreme Court and Supreme Court of South Carolina have found that punitive damages do not violate the Due Process clause, so long as the system for their imposition is accompanied by sufficient safeguards. The trial court also noted that South Carolina's commitment to the imposition of punitive damages in appropriate circumstances has been reaffirmed as a matter of public policy. The court found the record contained clear and convincing evidence that Cincinnati engaged in a wide variety of misconduct in issuing the policy and adjusting the claim justifying the award of punitive damages in the amount determined by the jury. The court held there was clear and convincing evidence that Cincinnati acted recklessly or in a conscious disregard of OSCO's rights by: disregarding substantial evidence that OSCO's loss was from water damage, rather than an off-premises power outage; refusing to pay, without explanation, even the undisputed portions of OSCO's

claims for eight months, despite repeated requests for payment; violating portions of its own claims manual; demanding documentation on a piecemeal basis for months after the loss; taking five months to advance the position that the freezer building had only $30,000 in contents coverage and did so *after* one of its adjusters determined that the loss was owed and increased the reserves; refusing to consider OSCO's very viable position on the issue of the incorrect address and Cincinnati's responsibilities, despite having insured OSCO's freezer building at a listed address of 597 High Street for the preceding five years; and requiring, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address.

The trial court also found there was clear and convincing evidence that Cincinnati was fully aware of the conduct of its agents, as one of its officers testified that he personally supervised the claim. The court found the punitive damages award was well

within proportions to the original actual award and the amount to which the court reduced the actual award, noting that the award in *Haslip* was more than 200 times the plaintiff's out of pocket expenses. The court found the award easily within Cincinnati's ability to pay as it is only three/one-thousandths of Cincinnati's net worth. The court also found the deterrent effect of the punitive award obvious, as the amount is substantial, designed to get the attention of Cincinnati without being excessive, and appropriate to effect the implementation of remedial action. The trial court noted in Cincinnati's written argument in support of its motion to vacate, Cincinnati stated it fired its agent, added new policy language, and took other, unspecified remedial steps, which demonstrates the punitive award achieved its purpose. Accordingly, the trial court confirmed the award.

After carefully reviewing the record, we agree with the trial court's analysis. A punitive damages award survives constitutional

scrutiny if: (1) the trial court's jury instruction explains the nature, purpose and basis for the award; (2) post trial procedures enable the court to scrutinize the award; and (3) an appellate review process ensures that the award is reasonable and rational. *Kinard v. Crosby*, ___ S.C. ___, 433 S.E.2d 835, 839 (1993). The trial court's charge in this case explained the nature, purpose and basis for the award, in compliance with *Gamble*. Further, the court reviewed both the actual and punitive damages awards and found them to be within reasonable limits. *See Weir v. Citicorp Nat. Serv., Inc.*, ___ S.C. ___, 435 S.E.2d 864 (1993)(under *Gamble v. Stevenson*, the trial judge **may** consider enumerated factors, but is not required to make findings of fact for **each** factor; after carefully reviewing the record, the Supreme Court found no error in the trial judge's review of the punitive damages award). Accordingly, we affirm the punitive damage award. *Kinard*, 433 S.E.2d at 839.

Cincinnati also complains that the trial court should not have included in the charge on punitive damages those factors cited in *Gamble* which appeared to be factually applicable to this case. Those factors, according to Cincinnati, are only for a post-trial evaluation by the court. The trial court held that while *Gamble* did list the factors in the context of review of the jury's award by the trial court, there appears to be no logical reason to assert they should not be considered by the jury. The court noted the Fourth Circuit Court of Appeals has held that federal trial courts must submit the *Gamble* factors to the jury, finding that the standards adopted by the South Carolina Supreme Court in *Gamble* are intended to be the basis for all awards of punitive damages in South Carolina. *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991). We find no error in the trial court's instruction and hold that it complies with the requirement in *Kinard* that the trial court explain the nature, purpose and basis for

the award to the jury.

Cincinnati also contends that the trial court should have declared a mistrial during the punitive damages phase, arguing that OSCO made improper arguments regarding the unusual length of the trial and that the testimony concerning Cincinnati's daily earnings was prejudicial and improperly suggested a formula for determining the amount of punitive damages. The court stated that Cincinnati raised only the question of an improper formula at trial, and accordingly only addressed that issue.

Dr. Oliver Wood, Osco's [sic] financial expert, testified that Cincinnati's daily earnings were approximately $290,000.00 per day and that it had therefore earned $2.9 million during the ten days of trial. The trial court found this testimony clearly relevant on the issue of Cincinnati's ability to pay an award. *See Mattison v. Dallas Carrier Corp.* and *Gamble v. Stevenson*. Further, the trial court perceived no prejudice from the daily earnings

testimony as the award of punitive damages was far less than $2.9 million. We find no abuse of discretion.[4]

III.

Cincinnati argues the trial court erred in failing to grant its motion for a new trial based upon the inconsistency of the jury's verdicts, since the jury returned widely varying amounts under the separate causes of action. We disagree.

It is the duty of the court to sustain a verdict when a logical reason for reconciling the verdict can be found. *Rhodes v. Winn-Dixie Greenville, Inc.*, 249 S.C. 526, 155 S.E.2d 308 (1967); *Haskins v. Fairfield Elec. Co-op.*, 283 S.C. 229, 321 S.E.2d 185 (Ct. App. 1984), overruled in part other grounds, *O'Neal v. Bowles*, ___ S.C. ___, 431 S.E.2d 555 (1993). *See also New*

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[4]We note the second part of the bifurcated hearing lasted only a few minutes. OSCO's counsel presented only one witness, Dr. Wood, and asked him thirteen questions. Cincinnati's counsel asked the witness only one question on cross examination, and presented nothing in reply.

York Carpet World v. Houston, 292 S.C. 101, 354 S.E.2d 924 (Ct. App. 1987)(a jury's verdict should be affirmed if it is possible to do so and carry into effect the jury's clear intention; it is the Court of Appeals' duty to uphold jury verdicts if they can be logically reconciled).

In this case, the jury found for OSCO on its negligence, breach of contract, and bad faith claims. Although the jury awarded different amounts under each theory, this does not mean the verdicts are inconsistent. Different damages are recoverable under each claim, and the trial court instructed the jury as to the appropriate measure of damages under each claim. In fact, in response to counsel's argument regarding exceptions to the charge, the court brought the jury back and specifically instructed the jury regarding the different measures of damage under each of OSCO's claims. We find no error.

IV.

Cincinnati argues the trial court erred in failing to grant its motion for a new trial as to actual damages, claiming the awards were unduly liberal, excessive, and motivated by passion, caprice and prejudice. We disagree.

Dr. Wood, an expert on evaluating business losses, testified that OSCO had suffered a loss of $595,216.00 up to the time of trial, due to a combination of unpaid property loss claims and loss of profit due to inability to sell, replace, and re-sell inventory. Tim Lee, OSCO's president, testified without elaboration that his business had suffered a loss of $750,000.00.

The trial court noted that while the jury could, and obviously did, believe Lee's testimony regarding damages, there was little, if anything, to substantiate the amount. The court determined that the actual damage award should be reduced to the amount established by Dr. Wood's expert opinion. The trial court

specifically held this did not mean the verdict was the result of caprice, passion or prejudice, nor that it should be set aside entirely. *See, e.g., Hall v. Palmetto Enter. II, Inc.*, 282 S.C. 87, 317 S.E.2d 140 (Ct. App. 1984).

A motion for new trial *nisi remittitur* asks the trial court in its discretion to reduce the verdict because it is "merely excessive," although not motivated by considerations such as passion, caprice or prejudice. *O'Neal v. Bowles*, ___ S.C. ___, 431 S.E.2d 555 (1993). The grant or denial of this motion is within the trial court's discretion and its decision will not be reversed on appeal absent an abuse of discretion. *Id.* We have reviewed the record and do not find an abuse of discretion. Further, we do not find the amount of the verdict grossly excessive so as to be the result of passion, caprice, prejudice, or some other influence outside the evidence, so to require a new trial absolute. *Id.*

Cincinnati also alleged the jury was motivated by improper argument on the part of OSCO's counsel. The trial court noted it recalled no impropriety which would taint the trial, and that Cincinnati made no objection at trial. We agree with the trial court that Cincinnati accordingly waived any right to question the propriety of the argument. *Johnson v. Painter*, 279 S.C. 390, 307 S.E.2d 860 (1983).

V.

Cincinnati argues the trial court erred in permitting expert testimony regarding the propensities of insureds to fail to read their policies, claiming the testimony contradicted the law of South Carolina that "failure to read a policy is contributory negligence/recklessness as a matter of law." Cincinnati claims an expert may not give an opinion on questions of law, nor can an expert instruct the court with respect to the law applicable to the case.

In its post-trial order, the trial court noted that the expert, Mike Barranco, commented briefly that most insureds do not read their insurance policies. The court also noted that Cincinnati contended this testimony was unduly prejudicial and "contradicted the clear law of South Carolina." The trial court held in the context in which it was given, Cincinnati suffered no prejudice from this remark, and its admission was not an abuse of discretion. The court also held the testimony was appropriate, citing *Shields v. South Carolina Dept. of Highways and Pub. Transp.*, 303 S.C. 439, 401 S.E.2d 185 (Ct. App. 1991), *cert. denied* (trial court admitted expert testimony that the Department's actions "bordered on criminal negligence"; the Court of Appeals disagreed that the expert commented "on what the law is" but actually only gave his opinion on an issue of fact in the case).

We have reviewed the record and arguments of counsel and find no abuse of discretion. *See Hofer v. St. Clair*, 298 S.C. 503,

ORANGEBURG SAUSAGE CO. v. CINCINNATI INS. CO.

381 S.E.2d 736 (1989) (the admission or exclusion of evidence is within the trial court's discretion).

VI.

Cincinnati argues the trial court improperly permitted attorney Ladson Beach to testify. Cincinnati claims that Beach was named as a witness in an untimely fashion, that Cincinnati was deprived of its right to fully depose Beach, and that Beach's testimony violated Rule 3.7 of the Rules of Professional Conduct (found in Rule 407, SCACR) in that his roles as advocate and witness unduly prejudiced Cincinnati.

Beach was the attorney OSCO initially hired when problems arose in its claim. The trial court found Beach "clearly played an integral and well-known part in the process which gave rise to this lawsuit." Cincinnati raised the issue concerning Beach's possible testimony at the outset of the trial and the trial court reviewed the matter overnight. The court determined that

Beach was entitled to be present as he was OSCO's attorney, but that the ethics rules prohibited an attorney-witness from continuing as an "advocate" in the trial. OSCO's counsel told the court and opposing counsel at the outset that Beach might be called, but only in rebuttal, for the purpose of contradicting words and actions attributed to him by an agent of Cincinnati. OSCO listed Beach as a potential witness the week before trial and his deposition was begun, though not completed. When the issue regarding Beach's testimony arose, the trial court offered Cincinnati the opportunity to request a continuance. Counsel declined to do so. The trial court held the Rules of Civil Procedure do not establish a cutoff for naming of witnesses and found nothing improper in allowing Beach to testify in reply. *McGaha v. Mosley*, 283 S.C. 268, 322 S.E.2d 461 (Ct. App. 1984).

The trial court added that under Rule 3.7 of the Rules of Professional Conduct, even if Beach acted as an advocate during

the trial, subsection (3) allowed testimony where "[d]isqualification of the lawyer would work a substantial hardship on the client." The trial court found that disqualification of Beach would have deprived OSCO of the only available witness to rebut the adjuster's testimony, which would be a substantial hardship to OSCO. The court determined it properly admitted Beach's testimony and there was no surprise to Cincinnati.

We have reviewed the record and arguments on appeal and find no abuse of discretion in the trial court's ruling.

VII.

Cincinnati argues the trial court erred in failing to instruct the jury that it could consider alleged recklessness, willfulness and wantonness of Cincinnati only as it related to alleged negligent procurement conduct by Bryant when determining punitive damages. It appears, however, that this issue was not properly preserved for appeal. Cincinnati raised the issue with the trial

court before the jury was charged on punitive damages. After much discussion, the trial court took the issue under advisement without making a ruling. The jury charge given did not exclude the bad faith evidence from the jury's consideration. While Cincinnati raised many other objections after the charge was given, it did not raise this particular objection again. Cincinnati's failure to request a ruling by the court and its failure to raise this particular objection to the punitive damages charge after the charge was given leaves the issue unpreserved for review. *See, e.g., Haskins*, 283 S.C. at 238, 321 S.E.2d at 191 (where trial judge does not make ruling and counsel does not pursue ruling, issue is not preserved for appeal); *Gruber*, 309 S.C. at 21, 419 S.E.2d at 795 (failure to object to improper jury instruction leaves issue unpreserved for appeal).

However, even if the issue were preserved, we find no error. Cincinnati contends that, because OSCO elected to recover

under its negligence cause of action, the jury should have considered only the evidence supporting the negligence claim during the punitive damages phase of the trial. We disagree.

Election of remedies is required to prevent double recovery for a single wrong. *Inman v. Imperial Chrysler-Plymouth, Inc.*, 303 S.C. 10, 397 S.E.2d 774 (Ct. App. 1990). OSCO suffered a single wrong and asserted several theories under which Cincinnati could be held liable. OSCO, of course, could not recover for both negligence and breach of contract and therefore elected to recover only on its tort claim. The jury specifically found Cincinnati acted willfully or recklessly in connection with OSCO's negligence claim and its bad faith claim. Punitive damages were thus appropriate under the negligence cause of action as well as the bad faith cause of action. OSCO therefore did not receive damages to which it was not entitled, nor did the punitive damages amount to a double recovery.

As part of its award of actual damages under its negligence claim, OSCO received the profits it lost as a result of Cincinnati's failure to timely process OSCO's claim, which delay prevented OSCO from replacing and reselling the damaged inventory. Cincinnati never challenged the propriety of the award of lost profits under OSCO's negligent procurement claim. Just as Cincinnati's handling of the claim was relevant to OSCO's actual damages under its negligent procurement claim,[5] it was also relevant to the award of punitive damages under the claim. The jury was therefore entitled to consider Cincinnati's conduct while processing OSCO's claim when assessing punitive damages. We have thoroughly reviewed the record and find no error in the instructions to the jury during the punitive damages phase of the trial.

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[5]*See Nichols v. State Farm Mut. Auto. Ins. Co.*, 279 S.C. 336, 306 S.E.2d 616 (1983) (actual damages may include damages from an insurer's unreasonable action in processing a claim).

VIII.

In summary, we conclude the trial court's order thoroughly and correctly disposed of the issues Cincinnati and Bryant raised in their post-trial motions. As a final comment, we observe that "[l]itigants, whether plaintiffs or defendants, are entitled to fair trials but not perfect trials." *Ketterman v. South Carolina Farm Bureau Mut. Ins. Co.*, 302 S.C. 276, 279, 395 S.E.2d 187, 189 (Ct. App. 1990), *cert. denied*. This notion was cogently expressed by the Supreme Court of South Carolina in *Smoak v. Seaboard Coast Line Railroad Co.*, 259 S.C. 632, 193 S.E.2d 594 (1972), in which the Court stated:

> The defendant is not entitled to a perfect trial, but only a fair trial. Hardly any case is completed without some flaw. If a new trial was required every time a flaw or mere possibility or prejudice occurred, litigation would be unduly prolonged. Our Court has held many times that such matters are basically for the sound discretion of the trial judge.

Id. 259 S.C. at 640, 193 S.E.2d at 598. Likewise, from our

thorough review of the voluminous record before the Court, we find that, although the trial may not have been perfect, Cincinnati and Bryant received a fair trial. We commend the trial judge for his skill and patience in handling such a long and complex trial.

Accordingly, the judgment is

AFFIRMED.

CURETON and GOOLSBY, JJ., concur.

THE SUPREME COURT OF SOUTH CAROLINA

May 9, 1995

William O. Sweeny, III, Esquire
William R. Calhoun, Jr., Esquire
Sandra S. Reid, Esquire
Sweeny, Wingate, Murphy & Barrow, P.A.
P. O. Box 12129
Columbia, S. C. 29211

I. S. Leevy Johnson, Esquire
Johnson, Toal & Battiste
P. O. Box 1431
Columbia, S. C. 29202

Re: Orangeburg Sausage Company v. Cincinnati Insurance Company, et al.

Dear Ms. Reid and Gentlemen:

The Court has issued the following Order on your Petition for a Writ of Certiorari in the above entitled matter:

"Petition for Writ of
Certiorari denied.

s/Ernest A. Finney, Jr. C.J.
For the Court

Associate Justice Jean H. Toal, not participating

May 9, 1995."

By copy of this letter we are advising all interested parties of the action of the Court in this matter.

Very truly yours,

DEPUTY CLERK

STATE OF SOUTH CAROLINA IN THE COURT OF COMMON PLEAS COUNTY OF ORANGEBURG	)
ORANGEBURG SAUSAGE COMPANY, Plaintiff, -vs- CINCINNATI INSURANCE COMPANY and R.L. BRYANT AND SON, INC., Defendants.	)))))ORDER REGARDING)POST-TRIAL)MOTIONS)Case # 90-CP-38-480))))

Plaintiff (OSCO) sued Cincinnati Insurance Company (Cincinnati) for breach of contract, negligence, and bad faith failure to pay insurance benefits. OSCO also sued R. F. [sic] Bryant & Son, Inc. (Bryant), the agent, for negligence in connection with the policy and claim. Following a jury trial, OSCO was awarded $800,000 actual damages on the negligence claim against both defendants. OSCO was also awarded $254,029.73 on the breach of contract claim, and $250,000.00 on the bad faith claim. The Court then required OSCO to elect and

recovery under negligence was chosen.

In response to a special interrogatory, the jury found that the defendants acted recklessly, wilfully, wantonly, or in conscious disregard for the rights of the plaintiff. By agreement of all parties, a separate punitive damages hearing was then held, resulting in an award of $1,630,000.00.

Bryant has moved for judgment notwithstanding the verdict, citing that OSCO was contributorily negligent or reckless.

Cincinnati has moved for judgment notwithstanding the verdict, a new trial, a new trial nisi remittitur, for post-trial review of punitive damages, and to vacate the punitive damage award. Cincinnati has advanced fifty grounds in support of its motions.

The motion for new trial nisi remittitur as to actual damages is granted, and Defendants shall be entitled to new trial unless OSCO remits so much of the actual damages award as will result in judgment for actual damages in that amount of $595,216.00. All other motions are denied.

BACKGROUND:

Hurricane Hugo struck the property of OSCO, a corporation engaged in the wholesale and retail sale of food products. The primary loss involved rainwater contamination to frozen foods which were stored in separate units of "the freezer building." Cincinnati adjusted the loss to be more that $250,000.00, but disputed OSCO's claim for insurance benefits. After a delay of eight months, it paid slightly over $36,000.00, asserting two primary positions. First, Cincinnati felt that OSCO had changed its position on the cause of loss after learning that the initial claim (off-premises power outage) was not covered. Second, Cincinnati said that the lion's share of contents coverage was not on the freezer building. It maintained that the building across the street had $230,000.00 in coverage. The freezer building had only $30,000.00.

OSCO's business complex surrounds the end of a dead end street. The office, slaughtering facilities, and a retail market are

on one side of the street. The freezer building is on the opposite side. Evidence showed that the entire business location has always been known as 597 High Street.

The defendants provided OSCO insurance on the contents of the freezers. An initial policy was written to cover the frozen food products beginning July 1, 1983 and ending July 1, 1988. This policy listed 597 High Street as the location. OSCO had requested coverage of $200,000.00 for the frozen food products alone, though the policy was written to cover all contents.

Three (3) years into the initial policy (in October, 1986), OSCO pledged as collateral for a loan its business real estate and equipment located on High Street. The loan required that the collateral be covered by casualty insurance, so OSCO asked Bryant to add the necessary coverage. An insurance binder was issued adding $75,000.00 for each building and $30,000.00 for the "contents - equipment" located in each. (It is important to remember, in evaluating this request for additional coverage, that

the frozen food products in the freezer building were the only contents which OSCO had previously sought to insure and that they had been insured for the preceding three years at an address of 597 High Street.) The binder describes one building as 597 High Street and the other as "across street from 597."

An application for additional coverage was drafted by Bryant, but not signed by OSCO despite a blank for OSCO's signature. There is no evidence that an OSCO representative had ever seen this document before this lawsuit. This application, for the first time, uses the erroneous 488 High Street as a premises address, in additional to a reference to 597. The evidence is undisputed that there is no 488 and that the freezer building would not have that designation if assigned one by the Post Office. The only credible evidence is that 488 first appeared on a form which the agent prepared, without the insured's signature or review.

About two years later, when the initial policy expired in 1988, a one-year policy was issued by Cincinnati. OSCO's

witnesses classified this as a renewal. OSCO sought no changes in coverage between the 1986 loan and the hurricane.

The representatives of OSCO said they did not read this policy, though Bryant's witness testified that a representative of Bryant delivered it and went over it with OSCO's vice president when it was received. Two experts testified that people generally do not read their insurance contracts and, if they do read them, they do not generally understand them. The insurance company drew this contract and chose the language to include in it.

When the 1988 policy is examined, the third page inside the cover of the policy is entitled "Common Policy Declarations." OSCO is the insured and the address is 597. The eighth page of the policy is entitled "Commercial Property Coverage Part Declarations" and is the only page which refers to a 488 address. On that page, item numbers are separately stated for the locations and the coverages, but there is no explanation for the significance of the numbering system.

The defendants say that the only plausible reading of the 1988 policy is that the freezer building is 488 (even though the evidence shows that the defendants insured it as 597 for the preceding five years) and that the contents there are insured for only $30,000.00, while the building on the opposite side of the street had $230,000.00 coverage for contents (even though there was competent evidence that the risk of loss was far greater for the freezer building). The defendants assert that, if OSCO had only looked at the 1988 policy, it would clearly have seen that the coverages were switched from what they should be.

The record contains a "Dealers Comprehensive Form," along with evidence that Cincinnati considered that it was included in the 1988 contract. This document can be read as providing coverage for products of the insured located anywhere that was owned, leased, or regularly used by the insured in its business.

When the hurricane hit, an off-premises power outage cut OSCO's electricity. Wind damaged OSCO's plant, allowing

rainwater to contaminate the frozen food products. OSCO sought payment from Cincinnati and, when the claim was not paid, promptly hired an attorney. The attorney forwarded to Cincinnati an itemization of losses totalling $231,505.12 in a letter of November 14, 1989, including $198,260.13 for contaminated frozen food in the main freezer. A demand for the undisputed portions of the coverage was also made.

Several adjusters for Cincinnati were involved in the claim. Affidavits and other materials were provided by OSCO, then Mr. Jim Guth, a Cincinnati adjuster, reviewed the claim and inspected the property. His report is in evidence (plaintiff's exhibit 20) and may certainly be read to indicate that Cincinnati determined OSCO's claim to be valid and covered. Mr. Guth raised the reserves on the contents as of December 5, 1989, to $210,000.00 Dollars. On December 8, 1989, OSCO sent Mr. Guth information, along with another demand for prompt payment of the undisputed amounts. Shortly thereafter, Mr. Guth's involvement

with the file was ended and yet another adjuster became involved, Mr. Hendrickson.

More information was supplied (perhaps resupplied) by OSCO on January 17, 1990. Despite the previous adjuster's findings and actions in raising the reserves, Cincinnati then informed OSCO that the contents coverage for the freezer building was limited to $30,000.00. Five months and four adjusters after the hurricane, on February 20, 1990, Cincinnati sent to OSCO an itemization of what it would pay which reflected the lower coverage level and imposed a coinsurance penalty.

On March 6, 1990, OSCO's attorney requested, for at least the fifth time, that the undisputed portions of the claim be paid. Five and one-half months after the hurricane, the request for payment of the undisputed amounts was sent to the home office and, about two weeks thereafter, the adjuster was instructed: (1) to pay the undisputed portions of the claim; and, (2) to set up a meeting to try to resolve the disputed portions. Two more months

passed. When the meeting was held in May, 1990, the payment tendered for the undisputed portion of the claim was conditioned upon OSCO's signing a receipt referring to losses at 597 and 488 High Street. The non-existence of 488 was a matter in dispute. Upon OSCO's refusal to sign, payment of the check for $41,319.83 was withdrawn. On May 23, 1990, approximately $5,000.00 was deducted for some reason and a check for $36,006.89 was sent for the undisputed amount by Cincinnati. The balance of the claim became the subject of this lawsuit and no further payments have been made since.

Thus, eight months passed between the hurricane loss and the payment of $36,006.89 towards a loss which Cincinnati adjusted at $254,029.23. No further sums were paid. On February 2, 1990, Cincinnati offered to pay a total of $75,675.51. Two years passed before the case came for trial.

ACTUAL DAMAGES.

Testimony regarding actual damages came from two

sources: Tim Lee, president of OSCO, and Dr. Oliver Wood, an expert on evaluating business losses.

Dr. Wood testified that OSCO had suffered a loss of $595,216.00 up to the time of trial, due to a combination of unpaid property loss claims and loss of profit due to inability to sell, replace, and re-sell inventory. Lee's testimony, which was without elaboration, was that his business had suffered a loss of $750,000.00.

While the jury could, and obviously did, believe Lee's testimony regarding damages, there was little, if anything, to substantiate the amount and the Court is of the opinion that the actual damage award should be reduced to that established by Dr. Wood's expert opinion. That is not to say that the verdict was the result of caprice, passion or prejudice, nor that it should be set aside entirely. Hall v. Palmetto Enterprises II, Inc., 282 S.C. 87, 317 S.E.2d 140 (S.C. App. 1984).

Cincinnati alleges that the jury was motivated by improper

argument on the part of OSCO's counsel, but no objection was made at trial. Any right to question its propriety was waived. Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

PUNITIVE DAMAGES

A separate hearing was conducted on the issue of punitive damages. The plaintiff called only one witness, an expert, who testified about Cincinnati's net worth, its reserves, and its earnings. Cincinnati offered no witnesses and asked only one question on cross examination. The entire punitive damages hearing lasted only minutes, though the parties were in no way restricted by the Court. The parties had previously agreed that they would not make closing arguments in this stage of the trial. Again, this was not at the Court's insistence. After deliberations, the jury found that clear and convincing evidence had been shown to justify an award of punitive damages. It awarded $1,630,000.00 in punitive damages, which was roughly twice the actual damage award and 0.003 percent of Cincinnati's net worth.

A post-trial review was conducted under the parameters of Gamble v. Stevenson, ___ S.C. ___, 406 S.E.2d 350 (1992), and findings made on the record. The Court has now considered additional materials which have since been supplied by Cincinnati.

Cincinnati has filed various motions to vacate the award of punitive damages, for a new trial, and for post verdict review of the punitive damages award. I have reviewed these motions in light of the requirements of Gamble and Pacific Mutual Life Insurance Company v. Haslip, ____ U.S. ____, 111 S.Ct. 1032, 113 L.Ed.2d 1 (1991), and now reaffirm my previous determination that the award of punitive damages in this instance was proper.

The U.S. Supreme Court and our state Supreme Court have found that punitive damages do not violate the Due Process clause, as long as the system for their imposition is accompanied by sufficient safeguards. South Carolina's commitment to the imposition of punitive damages in appropriate circumstances has

been reaffirmed as a matter of public policy. A review of the evidence shows that the record contains clear and convincing evidence that Cincinnati engaged in a wide variety of misconduct in issuing the policy and adjusting the claim justifying the award of punitive damages in the amount determined by the jury. Without question, there was very clear and very convincing evidence in the record that Cincinnati acted recklessly or in conscious disregard for the rights of OSCO in that it disregarded substantial evidence that OSCO's loss was from water damage, rather than an off-premises power outage; refused to pay, without explanation, even the undisputed portions of OSCO's claims for eight months, despite repeated requests for payment; violated portions of its own claims manual; demanded documentation on a piecemeal basis for months after the loss; took five months to advance the position that the freezer building had only $30,000.00 in contents coverage and did so after one of its adjusters determined that the loss was owed and increased the reserves;

refused to consider OSCO's very viable position on the issue of the incorrect address and Cincinnati's responsibilities, despite having insured OSCO's freezer building at a listed address of 597 High Street for the preceding five years; and, required, as a condition of payment of the undisputed portions of OSCO's claim, a concession on a major dispute concerning the address.

There is substantial clear and convincing evidence that Cincinnati was fully aware of the conduct of its agents, as one of its officers testified that he personally supervised the claim. The punitive award was well within proportions to the original actual award and the amount to which the actual award has now been reduced by the Court. (The award in Haslip was more than 200 times the plaintiff's out of pocket expenses.) The award is easily within Cincinnati's ability to pay, as it only three/one-thousandths of Cincinnati's net worth. The deterrent effect of the punitive award is obvious: it is in an amount which is substantial and designed to get the attention of Cincinnati without being excessive,

and appears to be appropriate to effect the implementation of remedial action. Moreover, Cincinnati has now submitted written argument in support of its motion to vacate which represents that Cincinnati fired its agent, added new policy language, and took other, unspecified remedial steps which would show that the punitive award achieved its purpose.

Cincinnati complains that the Court should not have included in the charge on punitive damages those factors cited in Gamble which appeared to be factually applicable to this case. Those factors, according to Cincinnati, are only for a post-trial evaluation by the Court. While Gamble did list the factors in the context of review of the jury's award by the trial court, there appears to be no logical reason to assert they should not be considered by the jury. The Fourth Circuit Court of Appeals has held that Federal trial courts must submit the Gamble factors to the jury, Mattison v. Dallas Carrier Corp., 947 F.2d 95 (4th Cir. 1992), holding that the standards adopted by the South Carolina

Supreme Court in Gamble are intended to be the basis for all awards of punitive damages in South Carolina.

Cincinnati complains that the Court failed to define "clear and convincing evidence." While Cincinnati now submits a number of definitions from other jurisdictions which should have been used, the Court specifically requested charges on this issue and none was provided. In the absence of a specific request or objection, the Defendant cannot complain of the Court's charge Irick v. Ulmer, 246 S.C. 178, 143 S.E.2d 126 (1965).

Cincinnati contends a mistrial should have been declared during the punitive damages phase, and cites several reasons: that the jury had already awarded excessive actual damages and should not have been allowed the consider punitive damages; that Plaintiff was appealing to a "tired" jury; and that Dr. Wood's testimony concerning the Defendant's daily earnings was so prejudicial as to warrant a mistrial. Only the last was raised at trial.

Dr. Wood testified that Cincinnati's daily earnings were

approximately $290,000.00 per day, and that it had therefore earned $2.9 million during the ten days of trial. Such testimony is clearly relevant on the issue of ability of the Defendant to pay an award (see Mattison and Gamble). Further, the Court perceives no prejudice from the daily earnings testimony as the award of punitive damages was far less than $2.9 million.

CONTRIBUTORY NEGLIGENCE

Cincinnati and Bryant contend that the Court erred in several respects regarding the issue of contributory negligence. The major points of contention concern: (1) the refusal to grant a directed verdict because OSCO officials testified that they had not read the 1988 policy; and, (2) the refusal to charge the jury that failure to read a policy of insurance is contributory negligence as a matter of law.

Even if it could be held that OSCO was contributorily negligent as a matter of law in failing to read the insurance policy, the jury affirmatively found, with ample supporting evidence, that

the defendants were willful, wanton and reckless. Contributory negligence is not a defense to reckless and wilful conduct, and the issue of contributorily recklessness was not raised at trial.

It is the burden of the defendant asserting the issue of contributory negligence to prove it and there were many material issues of fact regarding that determination which justified its submission to the jury.

First, Bryant maintained throughout this case that a representative of the agency had driven out to OSCO's plant, delivered the insurance policy, and reviewed the provisions of the insurance policy with OSCO officials. So, Bryant, on the one hand, said that the policy was fully reviewed with OSCO after it was received but, on the other hand, asserted that Bryant is not responsible as a matter of law for any negligence because OSCO did not read the policy. In my view, that is an inconsistency which justifies submission of the issue to the jury to determine what actually took place.

Second, the primary underlying issue in this case was the amount of coverage which the policy provided for frozen food products located in a freezer building across from the office of OSCO. The argument of the defendants is that, if only OSCO had read its policy, it would have seen the error. Thus, OSCO was, as a matter of law, contributorily negligent. I fully understand that our Court of Appeals and Supreme Court have made determinations in cases which reflect a general rule that failure to read one's insurance contract is contributory negligence as a matter of law. [Two of the cases cited by the defendants were King v. Oxford, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) and Doub v. Weathersby-Breeland, Ins. Agency, 268 S.C. 319, 233 S.E.2d 111 (1977)]. Aside from the argument advanced by plaintiff that those cases were based on theories of fraud, those cases, in my view, are clearly distinguishable factually from this case.

Here, there was clearly an ambiguity in the contract concerning the applicability of the Dealers Comprehensive Form.

The agent, Bryant, wrote Cincinnati and received word that this form was a part of the policy. That form can easily be read to provide coverage for the inventory of OSCO at any location which is within the control of OSCO.

Also, there is clearly an ambiguity as to the coverage for the contents of the freezer building. The evidence is overwhelming that from 1983 to 1988, Cincinnati and Bryant insured the frozen food located in the freezer building for at least $200,000.00 at an address listed as 597 High Street. In fact, for most of the period, this was the only property which OSCO wanted insured. The evidence is equally overwhelming that the policy in effect on the date of the loss was a renewal, with no request for additions or deletions of coverage by OSCO at that time. On the date of the loss, there was $230,000.00 of coverage for contents located at 597 High Street. The only evidence is that the erroneous address of 488 High Street, and the assigning of an additional $30,000.00 of contents coverage for a building at that

erroneous address, was caused by the defendants. It is absolutely preposterous under these circumstances, to assert so vehemently that the defendants are entitled to a finding, as a matter of law, that OSCO would have known that there was only $30,000.00 on the freezer building's contents if only the policy had been read. That, simply, is not supported by the evidence and I cannot believe that our case law requires such a determination.

In this case, as in others which are relied upon by the defendants, expert testimony was presented on the ability of lay people to understand insurance contracts. As has been previously indicated, even the agent, after reading the policy, did not clearly understand that the Dealer's Comprehensive Form was included. If included, it may be read to cover inventory regardless of location. The erroneous address is shown only on one of two declarations pages, which is located on about the ninth page of the policy. There is no explanation as to the significance of the numbering system used by the insurance company which drafted

the policy. And, again, the same insurance company had insured the same product at the same address shown on the declarations pages for the preceding five years.

To be a valid defense, contributory negligence must be a proximate cause of the plaintiff's injury. That certainly was not established to a degree to justify removing the issue of contributory negligence from the jury by directed verdict. Further, in light of the conflicting evidence regarding Bryant's claim that the policy was explained to OSCO; the finding of recklessness on the part of the defendants, with no assertion in the trial that OSCO was contributorily reckless; and the issues of ambiguity in the policy itself, the Court is convinced that the appropriate way to proceed on the issue of contributory negligence was to submit the issue to the jury, with instructions that it may determine that the failure to read the policy was contributory negligence. Our Supreme Court and Court of Appeals have consistently held contributory negligence is generally a jury question. "Even where the

undisputed facts tend to show both the parties guilty of negligence, questions of negligence, proximate cause, and contributory negligence should be submitted to the jury if there is a fair difference of opinion as to whose act or acts produced or contributed to the injury complained of as a direct and proximate cause." Republic Textile Equipment v. Aetna Ins., 293 S.C. 381, 360 S.E.2d 540 (S.C. App. 1987).

AGENCY

Cincinnati argues that the Court erred in ruling as a matter of law that Bryant was the agent of Cincinnati, alleging "numerous facts" in the record, without citing any.

In reality, there was no real dispute about the issue of agency. Bryant testified to it and introduced his agency contract into evidence with no objection from Cincinnati. The only evidence on the issue from Cincinnati came from its vice president, Mike Gagnon, who testified that Bryant was an "independent agent," meaning he was free to sell other lines of

insurance. That does not mean, however, that he was not Cincinnati's agent. Bryant filled out and transmitted OSCO's applications, collected the premiums, sent the premiums, was paid a commission by Cincinnati, and acted as Cincinnati's representative in communicating with OSCO. Under Section 38-43-10, S.C. Code Ann. (1976) and general principles of agency, there is no other reasonable conclusion but that Bryant was Cincinnati's agent for the purposes of this action.

ELECTION OF REMEDIES

There are really two issues with regard to election. The Defendants' original written motion to elect sought to require election between the legal remedies sought by OSCO (breach of contract, negligence, bad faith) and the equitable remedy sought (reformation). Then, during the trial, Defendants made oral motions to require, as the Court interpreted them, election between tort and contract.

Election between legal and equitable remedies was

discussed in Harper v. Ethridge, 290 S.C. 112, 348 S.E.2d 374 (S.C. App. 1986). Referring to the SCRCP, the Court held that a plaintiff may join in the alternative as many claims, legal or equitable, as he has against the opposing party, even if the claims are inconsistent.

Cincinnati argues that the jury was exposed to contradictory evidence, but the ultimate ruling on the reformation claim was reserved for the Court. The jury was never told of the existence of such a claim nor did the claim's existence result in introduction of evidence that would not have been introduced on the legal claims.

As for Cincinnati's argument that election between tort and contract was required, Nichols v. State Farm, 279 S.C. 336, 306 S.E.2d 616 (1983) established the procedure that the trial judge present both causes of action to the jury and strike the damage portion after election.

SUFFICIENCY OF EVIDENCE

Considering the evidence in the light most favorable to OSCO, the Court finds no merit to Cincinnati's argument that the evidence presented does not support the verdicts of the jury and that the verdict is contrary to the greater weight of the evidence. Based upon the recitation of evidence previously stated, the evidence clearly warranted sending the case to the jury on all causes of action and the jury's determination.

ALLEGED IMPROPER ARGUMENT OF COUNSEL

Cincinnati argues in various ways that the trial was tainted by improper argument of counsel. While the Court recalls no impropriety which would taint the trial, no objection was made to counsel's argument and any right to question its propriety is therefore waived. Johnson v. Painter, 279 S.C. 390, 307 S.E.2d 860 (1983).

BAD FAITH

Cincinnati argues that it cannot be held liable for bad faith

because: (1) it had reasonable grounds to deny OSCO's claim; and, (2) if the contract was ambiguous, its interpretation was per se reasonable.

For reasons previously stated under the discussion regarding contributory negligence, there was clearly evidence that the policy was ambiguous and that the erroneous address was the fault of the defendants. The contract listed $230,000 of contents coverage at 597 High Street, the uncontradicted address of OSCO's business and the address which had previously been used to insure the contents of the freezer building. Cincinnati, when it investigated the address issue, confirmed that there was no such address as 488 High Street and that OSCO had never used any address other than 597 High Street. At that point, the evidence may clearly be interpreted to warrant a determination that Cincinnati had no reasonable grounds to continue to insist that the freezer building alone was in fact 488 High Street. Nonetheless, that is the position it steadfastly took.

Further, there is strong evidence that Cincinnati acted unreasonably and in conscious disregard for the rights of OSCO in adjusting the claim, including not only the positions it took, but the delays and methods used. There is abundant evidence that Cincinnati knew early on that it owed the claim, that it changed its position regarding reasons for denying the claim, that it unreasonably delayed payment of undisputed parts of the claim, and that its own investigation disclosed no valid reason for denying the claim. In other words, there is abundant evidence of bad faith.

Cincinnati argues that, if the policy is ambiguous, it cannot be guilty of bad faith, because denying liability under an ambiguous policy is, by definition, reasonable. It appears to the Court that the opposite is true. The insurance company, having drawn the contract and collected premiums for $260,000.00 in contents coverage, is obliged to interpret the contract so as to authorize paying the claim, not denying it, where there is a reasonable assertion of coverage. Hann v. Carolina Casualty Ins.

Co., 252 S.C. 518, 167 S.E.2d 420 (1969).

WAIVER AND ESTOPPEL

Cincinnati's brief lumps together the different legal concepts of waiver and estoppel, though it appears to argue waiver. A waiver is an intentional relinquishment of a known right. Lyles v. BMI, Inc., 292 S.C. 153, 355 S.E.2d 282, 285 (S.C. App. 1987). Estoppel is a principle which prevents one whose actions or words are relied upon by another from changing his position to the detriment of that other person. Russell v. Drivers Leasing, 282 S.C. 358, 318 S.E.2d 579 (S.C. App. 1984).

Cincinnati does not argue estoppel in its brief. There is no issue of estoppel.

Cincinnati does argue that OSCO, by failing to read the policy, waived its right to recover under the policy. Since waiver is an intentional act, it defies logic to believe that a party would continue to pay insurance premiums for $260,000.00 in contents coverage, while intending to give up its right to recover under the

policy in case of a loss. There was no waiver.

SEQUESTRATION AND WITNESSES

MR. CARRIG: Cincinnati complains that Mr. Carrig was allowed to testify in violation of this court's own sequestration order. This is not correct. The Court did impose a sequestration order. At the conclusion of Mr. Carrig's testimony, the Court was asked if it was necessary to continue the sequestration of witnesses who had already testified. The Court determined that it was not, despite the fact that reply testimony might be elicited. No order was violated.

The real question is whether there was error in allowing Mr. Carrig to stay in the courtroom after he had testified, and then be recalled to the stand in reply. Sequestration of witnesses is a matter which is within the discretion of the trial judge. While the procedure used might not have been the best in hindsight, it was applied to both sides evenly and the Court perceives no prejudice to the rights of the defendant. The fact that the plaintiff presents

witnesses first in a trial might have created an advantage in the event that reply testimony was necessary. That would be the case in any trial, because certain procedural advantages and disadvantages are present in all situations. The chief officer of Cincinnati (Mr. Gagnon) and the only witness of Bryant (Mr. Bryant) were present throughout the trial. This is a case in which the parties had the benefit of extensive discovery, depositions, and preparation. In addition, the Court is aware that the parties were having various transcripts of the testimony prepared by the Court Reporter during the trial of the case. It is inconceivable to me that the sequestration process used contributed in any material way to the outcome of the trial. Even though Cincinnati avers that the nonsequestration of Mr. Carrig "clearly prejudiced" the defendants, it offers no example of such prejudice and I am aware of none.

MR. BEACH: Cincinnati further complains about the testimony of Ladson Beach being allowed, in part because he was

not sequestered. Cincinnati also contends Beach was not named as a potential witness in a timely fashion and that Beach's testimony violated Rule 3.7 of the Rules of Professional conduct.

Mr. Beach was one of OSCO's attorneys, the one who was hired by OSCO initially when problems arose in its claim. He clearly played an integral and well-known part in the process which gave rise to this lawsuit.

The issues concerning Mr. Beach's possible testimony were raised at the outset of the trial and the Court reviewed the matters overnight. I determined that Mr. Beach was entitled to be present as he was OSCO's attorney. I determined that the ethics rules prohibited an attorney-witness from continuing as an "advocate" in the trial. The Court and opposing counsel were told at the outset that Mr. Beach might be called, but only in rebuttal, for the purpose of contradicting words and actions attributed to him by an agent of the defendant. He was listed as a potential witness by the plaintiff the week before trial and his deposition was begun,

though not completed.

When issue regarding Beach's testimony arose, Cincinnati was offered the opportunity to request a continuance. Counsel declined to do so. The SCRCP do not establish a cutoff for naming of witnesses. I find nothing improper in allowing this witness to testify in reply. McGaha v. Mosley, 283 S.C. 268, 322 S.E.2d 461 (S.C. App. 1984).

Under Rule 3.7 of the Rules of Professional Conduct, even if Beach acted as an advocate during the trial, subsection (3) allows testimony where "[d]isqualification of the lawyer would work a substantial hardship on the client." Here, disqualification would have deprived OSCO of the only available witness to rebut the adjuster's testimony. That would be a substantial hardship to OSCO. Beach's testimony was properly admitted and there was no surprise to the defendants.

MR. POOSER: Pooser was employed by one of OSCO's former suppliers. His testimony related to the volume of OSCO's

business and its cash flow problems after losing its inventory. Although Pooser himself was not named as a witness, another employee of the same business was named. Pooser appeared at trial because the other employee could not attend. Pooser had knowledge of the same matters as the other employee, and the potential testimony described in answers to interrogatories for the other employee was identical to the testimony given by Pooser. No attempt was made to depose the other employee. Cincinnati suffered no prejudice because Pooser testified instead of his co-worker.

EXPERT TESTIMONY REGARDING READING OF POLICIES: Mike Barranco, one of plaintiff's expert witnesses, commented briefly that most insureds do not read their insurance policies. Cincinnati now contends that this testimony was unduly prejudicial and "contradicted the clear law of South Carolina." In the context in which it was given, the Court perceives no prejudice from this remark, and its admission was not an abuse of discretion. It was

proper testimony from an expert witness in this case. [See Shields v. DHPT, 303 S.C. 439, 401 S.E.2d 185 (S.C. App. 1991)]

MR. HENDRICKSON: Cincinnati charges error in allowing questioning of defense witness Charles Hendrickson about documents he had never seen before. I am unable to determine any specific assertion of error and, quite frankly, do not know why it would be improper to ask a witness about a document on cross examination. If the witness did not know about it, I assume that is the response he or she would give.

Error is also alleged in allowing Hendrickson to be asked whether he would put more credence in a written document prepared in 1983, or a person's memory of what happened in 1983. Cincinnati complains that the question required their witness to weigh the evidence, and is thus improper. The question, however, was put to the witness in a context of claims adjusting on cross examination and was a proper question.

THE 1983 POLICY

Cincinnati alleges error in allowing questioning about a 1983 policy, which it contends was irrelevant to the issues. Testimony regarding the 1983 policy was elicited without objection, by all parties.

The Court perceives no prejudicial error. On the contrary, the 1983 policy was the genesis of the controversy. Evidence was presented that negligence in the handling of the original policy was carried over into the renewal policy. The circumstances surrounding the making of the 1983 policy were relevant, among other things, to the coverage OSCO asked for, what it was entitled to believe, and the interpretation of the 1988 policy.

COMMUNITY ACTIVITIES

Cincinnati contends that it was prejudiced by admission of evidence of OSCO's community activities. OSCO, like any other party is allowed to present some testimony which "personalizes" it. The defendant, for example, presented testimony designed to

portray its adjusters as selfless volunteers, working long hours far from home. The testimony presented concerning OSCO's community activities was so minimal and cursory that no possible prejudice could have resulted.

JURY CHARGES

Cincinnati argues that the Court erred in failing to give numerous jury charges it requested. The record will reflect that the requested charges were cumulative to other charges given by the Court. The specific issues addressed by the defendant's motion are construction of the contract, bad faith, and contributory negligence. Each of these issues was covered fully in the charge as given. Since negligence was the recovery elected by the plaintiff, the primary issue would appear to be contributory negligence, which was discussed in detail above.

BIAS OR PREJUDICE OF THE TRIAL JUDGE

For several years, I umpired baseball games. There was rarely a problem with a player, just from coaches or parents who

should have known better. Despite hundreds of "good" calls, when a call was "bad," someone would accuse an umpire of cheating. These were preposterous assertions, for no umpire had anything to gain or lose. And never was there a call that was quite as critical to the outcome of a game as some tried to make it. In many ways, such criticism was expected as part of the territory and rather comical: a clear assumption of risk.

There is nothing comical about a claim of prejudice on the part of a trial judge. What a sad comment it is upon the legal profession and the bench if such damning attacks on a judge's integrity can spew forth with no more basis in fact than that which is acceptable to bleacher bums.

It is one thing to say that the umpire was wrong, or that he has the eyesight of a winged bat or the intellect of a wooden one. It is quite another thing to seriously accuse the umpire of cheating.

What we have in this case is not a challenge to my ability to see the evidence or to interpret the law. This is not an assertion

that I made an error. Errors were made, though I honestly do not think they affected the outcome. This is a claim that I was prejudiced against litigants and refused to apply the "clear law" because of that prejudice. This is an assertion of judicial impropriety in violation of Canon 3 of the Code of Judicial Conduct.

Despite counsel's apparent position now that this prejudice was demonstrated throughout the trial, the issue was never raised during it. There was never a motion to recuse. The reason, to me, is obvious. The allegation is totally untrue.

While there is a reference to my refusal to allow a continuing objection during the punitive damage phase of the trial (in which you could probably count the total number of questions on one hand), the gist of the "basis" for this claim of prejudice seems to be my refusal to rule with the defendants on the unbending rule that the failure to read one's insurance policy is contributory negligence as a matter of law. Every case cited by

counsel is distinguishable and I have set forth my reasoning in more detail in the discussion of contributory negligence, including contributory recklessness, above.

Counsel includes a quote which they cite as a demonstration of my obvious bias. That comment clearly arose, outside the presence of the jury, in the context of evaluating the testimony of two expert witnesses regarding understanding insurance policies. It was my duty to determine if there was a jury issue, necessitating that I review the evidence. I was merely saying what many Courts, in South Carolina and other states, have recognized: insurance contracts are sometimes difficult for people to understand. Evidence is evaluated in light of common experiences. Dealing with insurance coverage is, without doubt, a fairly universal experience.

This one-sentence quote referred to a situation where my insurance agent and I disagreed over the meaning of the language in my policy. It did not involve Cincinnati. The matter was

resolved in my favor without substantial difficulty. There was no claim involved. It cost me nothing. In short, it was no big deal, and it is absolutely ridiculous to assert that this so obviously demonstrates prejudice on my part. In fact, I kept that same policy and agent for a number of years thereafter, made a claim under it, and was promptly and professionally paid.

I have not had any difficulties which would cause me to have any prejudice towards the insurance industry, nor Cincinnati Insurance Company. To the best of my recollection, I have never had any dealings with Cincinnati.

This is not a case where someone told an insurance agent, "I want full coverage," never read the policy, then sued when the policy did not cover a situation which was clearly excluded in the policy. In this case, the loss was claimed for inventory which was the ONLY thing the insured wanted covered during the first three years, and the primary thing thereafter. For all the reasons previously stated, it appears to the Court that the policy is

obviously ambiguous and that it is very reasonable to read it in the manner advanced by the plaintiffs. It would be totally inequitable to rule, as a matter of law, that the defendants, which created this error, should now be allowed to define its meaning in such restrictive terms as to deny coverage to the plaintiffs as a matter of law. If that is the "clear law" in South Carolina, then its application in this case creates a result which is clearly wrong. This situation is different and I applied the law as I understand it to be, and the only bias or prejudice I had in doing so was that against injustice.

CONCLUSION

The motion for new trial nisi remittitur as to actual damages is granted, and defendant Cincinnati only shall be entitled to a new trial unless plaintiff consents to a reduction in the actual damages judgment to the sum of $595,216.00.

All other motions are denied.

AND IT IS SO ORDERED.

WILLIAM P. KEESLEY

Presiding Judge

Edgefield, South Carolina

May 26, 1992

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No. 95-223

IN THE
Supreme Court of the United States
OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,
Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the South Carolina Court of Appeals

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE IN SUPPORT OF THE PETITION

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MOTION FOR LEAVE TO FILE BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

The American Council of Life Insurance ("ACLI") hereby moves, pursuant to Rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the petitioner has consented to the filing of this brief; counsel for the respondent has refused consent.

The American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of more than 600 member life insurance companies. These companies currently

underwrite 90.9 percent of the life insurance in force in legal reserve life insurance companies in the United States.

Defining the procedural and substantive limitations that the Due Process Clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to ACLI's members. In recent years, courts have permitted juries to assess substantial punitive damages awards against life insurers, often in the absence of due process constraints, and have deferred to those awards even though they are imposed without meaningful standards and bear no rational, objective relationship to the purposes of punishment and deterrence. These decisions drastically and unpredictably enlarge the risks facing life insurers, which must rely on a predictable allocation of risks and costs in providing insurance, and jeopardize their ability to offer affordable insurance.

Consequently, ACLI's members have a particular interest in one of the questions presented by the petition for certiorari in this case: the kind of review that appellate courts must provide in deciding whether a jury's award of punitive damages is constitutionally excessive.* Because of its nationwide constituency, ACLI is uniquely able to provide this Court with the views of the life insurance industry concerning this issue and to offer additional arguments underscoring the importance of this Court's review. In other cases involving the constitutionality of current punitive damages law, ACLI has filed *amicus* briefs in this Court. *See, e.g., BMW of North America, Inc. v. Gore*, 115 S. Ct. 932 (1995) (granting writ of certiorari); *Honda Motor Co. v. Oberg*, 114 S. Ct. 2331 (1994); *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993); *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991); *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989); *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71

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* Question No. 1(e) presented in the petition for certiorari.

(1988); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813 (1986). For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the petition for certiorari.

Respectfully submitted,

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QUESTION PRESENTED

What are the factors that appellate courts must, at a minimum, consider when reviewing a punitive damages award to determine whether it is so excessive as to violate the Due Process Clause?

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BRIEF FOR THE AMERICAN COUNCIL OF LIFE INSURANCE AS AMICUS CURIAE IN SUPPORT OF THE PETITION

INTEREST OF THE AMICUS

As stated in the motion accompanying this *amicus* brief, the American Council of Life Insurance ("ACLI") is the largest life insurance trade association in the United States, representing the interests of more than 600 member life insurance companies. These companies currently underwrite 90.9 percent of the life insurance in force in legal reserve life insurance companies in the United States.

It is important to the members of ACLI that this Court clarify the kind of review that appellate courts must provide in deciding whether a jury's award of punitive damages is constitutionally excessive.[1] When juries assess substantial punitive damages awards against life insurers, and appellate courts fail to scrutinize those awards in an appropriate manner, the result is often approval of an award that bears no rational, objective relationship to the purposes of punishment and deterrence. Such decisions drastically and unpredictably enlarge the risks facing life insurers and jeopardize their ability to offer affordable insurance. ACLI thus files this brief to provide the Court with its unique perspective, based on the experiences of its broad-based constituency, regarding the issue of appropriate appellate review and to offer additional arguments underscoring the importance of this Court's review.

STATEMENT

1. Because Petitioner sets the facts forth fully in the petition for certiorari, ACLI only summarizes the facts here. Respondent Orangeburg Sausage Company ("OSCO") is a corporation that sells food products. Its facilities, which are located on High Street in Orangeburg, South Carolina, include a freezer building, in which frozen foods are stored and, on the other side of the street, its offices, slaughtering facilities, and a retail market. Appendix to Petition for Certiorari ("Pet. App."), at 3-4.

Petitioner Cincinnati Insurance Company ("Cincinnati"), which provided coverage at the premises beginning in 1983, wrote a one-year renewal policy, in 1988, which provided coverage of (1) $75,000 for property and $230,000 for contents at 597 High Street and (2) $75,000 for property and $30,000 for contents at 488 High Street. Pet. App. 4-6. Cincinnati believed that 597 High Street was the address for the offices, slaughtering

[1] Question 1(e) presented in the petition for certiorari.

facilities, and retail market, while 488 High Street was the address for the freezer building. Petition for Certiorari ("Pet."), at 12-13. However, OSCO later asserted that 597 High Street was the correct address for all of OSCO's buildings, and that Bryant, the insurance agent contacted by OSCO, had erred in requesting coverage at "488 High Street." Pet. 12.

In September, 1989, Hurricane Hugo caused approximately $250,000 in damage to frozen foods stored in the freezer building. Pet. App. 7-8. Cincinnati took the position that the policy, as written, provided only $30,000 of coverage for the contents of the freezer building, and eventually sent OSCO a check for $36,006.09. Pet. App. 9-11. OSCO asserted that it was entitled to substantially more than that.

2. OSCO filed suit against Cincinnati and Bryant in the Court of Common Pleas for Orangeburg County, South Carolina ("the trial court"), claiming that Cincinnati was liable for breach of contract and bad faith and that, in the alternative, both Bryant and Cincinnati were liable for negligent procurement, based upon Bryant's failure to obtain the proper coverage for OSCO. Pet. App. 2; Pet. 16-17. By agreement, the trial was bifurcated, with the jury first deciding the claims for actual damages and then, after a separate hearing, the claims for punitive damages. Pet. App. 3. In the actual damages phase of the trial, the jury awarded OSCO $800,000 against both Bryant and Cincinnati on the negligent procurement claim. *Id.* at 2.[2] In the punitive damages phase of the trial, OSCO elected to proceed solely against Cincinnati. Pet. 23. After a brief hearing, the jury awarded OSCO $1,630,000 in punitive damages. Pet. App. 3.

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[2] The jury also awarded actual damages of $254,029.73 on the breach of contract claim and $250,000 on the bad faith claim. Pet. App. 2. However, following the verdict on actual damages, the trial court required OSCO to elect its grounds of recovery, and OSCO chose to recover under the negligent procurement theory. *Id.* at 3.

3. Cincinnati filed various post-trial motions, including motions to vacate the award of punitive damages, for a new trial *nisi remittitur*, and for post-verdict review of the punitive damages award. Pet. App. 55; Pet. 28.[3] The trial court then conducted a post-trial review of the punitive damages award, pursuant to *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), which sets forth a list of discretionary factors that trial courts may consider in determining whether a jury's award of punitive damages is excessive. Pet. App. 55. The trial court concluded that the award was proper. *Id.*

4. Cincinnati appealed the award of punitive damages, among other issues, to the South Carolina Court of Appeals ("the Court of Appeals"). Pet. App. 3. Citing *Gamble*, which requires appellate courts to employ an "abuse of discretion" standard in reviewing trial court rulings concerning the excessiveness of punitive damages, the Court of Appeals upheld the punitive damages award. In support of that conclusion, it first recited the findings of the trial court and then, without offering any independent analysis, held (1) that "[a]fter carefully reviewing the record, we agree with the trial court's analysis" and (2) that "the trial court reviewed both the actual and punitive damages awards and found them to be within reasonable limits . . . Accordingly, we affirm the punitive damage award." Pet. App. 23-24 (citations omitted).

5. Cincinnati filed a petition for certiorari with the South Carolina Supreme Court, in which it argued, among other things, that the jury's award of punitive damages was excessive and that the Court of Appeals had not provided the kind of meaningful appellate review approved by this Court in *Haslip*. The petition for certiorari was denied. Pet. App. 41-42.

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[3] In South Carolina, the vehicle for seeking a remittitur from the trial court is to file a motion for new trial *nisi remittitur*. If the trial court reduces the award, the plaintiff must either accept the reduction or submit to a new trial.

REASONS FOR GRANTING THE WRIT

In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), this Court held that Alabama's procedures for assessing and reviewing punitive damages awards satisfied the requirements of the Due Process Clause. Because *Haslip* approved Alabama's procedures in their entirety, without specifying exactly which procedures were necessary to meet constitutional standards, questions have since arisen, in both South Carolina and other states, as to whether procedures other than Alabama's also satisfy the requirements of the Due Process Clause. *See, e.g.*, *Gamble v. Stevenson*, 406 S.E.2d 350, 353 (S.C. 1991) ("Apart from determining that Alabama's scheme for awarding punitive damages passes constitutional muster, however, the *Haslip* Court provided 'no guidance as to whether any *other* procedures are sufficiently reasonable' ")[4]; *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 900 (Tenn. 1992) ("While the Court upheld the particular method employed by the Alabama courts in [*Haslip*], it was not entirely clear whether the majority was giving its carte blanche approval to the common law scheme"); *Hanson v. American Nat'l Bank & Trust Co.*, 865 S.W.2d 302, 310 (Ky. 1993) (*Haslip* "did not identify the parameters the trial court and appellate court should apply in insuring that an award of punitive damages meets the test of due process"); *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 12 n.1 (Tex. 1994) ("The manner and extent to which due process requires procedural safeguards and substantive limits on punitive damages is a matter of continuing controversy throughout the United States").

This case brings to the Court one of the resulting issues: namely, which of the factors mentioned in *Haslip* appellate courts must, at a minimum, consider when deciding whether punitive damages awards are excessive. Although

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[4] Citing *Haslip*, 499 U.S. at 24 (Scalia, J., concurring) (emphasis in original).

Haslip apparently held that appellate courts must consider "detailed" and objectively measurable criteria when deciding whether punitive damages awards are excessive, a number of state courts have construed *Haslip* differently, and have concluded that much more limited appellate review is sufficient to satisfy the requirements of the Due Process Clause. Consequently, absent this Court's review, appellate courts, like those in South Carolina that have yet to disturb a punitive damages award since *Haslip*, will continue to approve punitive damages awards based on limited and virtually standardless review of those awards.

DESPITE THIS COURT'S DECISION IN *HASLIP*, WHICH APPARENTLY REQUIRES APPELLATE COURTS TO CONSIDER A NUMBER OF SPECIFIC FACTORS IN DETERMINING WHETHER AN AWARD OF PUNITIVE DAMAGES IS SO EXCESSIVE AS TO VIOLATE THE DUE PROCESS CLAUSE, MANY APPELLATE COURTS FAIL TO CONSIDER SOME OR ALL OF THOSE FACTORS IN DETERMINING WHETHER AN AWARD OF PUNITIVE DAMAGES IS EXCESSIVE.

When approving Alabama's procedures in *Haslip*, the Court emphasized that when reviewing punitive damages awards for excessiveness, the Alabama Supreme Court "first undertakes a comparative analysis . . . then applies the detailed substantive standards it has developed for evaluating punitive awards [as set forth in *Green Oil Co. v. Hornsby*, 539 So.2d 218, 223-224 (Ala. 1989)]." [5]

[5] Those standards were as follows: "(a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the

499 U.S. at 21. In an accompanying footnote, it noted that the application of these specific standards "distinguishes Alabama's system from the Vermont and Mississippi schemes about which Justices expressed concern in [prior cases] . . . . In those respective schemes, an amount awarded would be set aside or modified only if it was 'manifestly and grossly excessive' . . . or would be considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience' . . . ." *Id.* at 21 n.10 (citations omitted). Finally, it noted that in the case under review, the Alabama Supreme Court had provided "appropriate" review of the punitive damages award, bringing "to bear all relevant factors recited in *Hornsby*." *Id.* at 23.

South Carolina's system appears to be more like the Vermont and Mississippi schemes that the Court questioned in *Haslip* than like the Alabama scheme that the Court approved. In South Carolina, appellate courts reviewing punitive damages awards to determine whether they are so excessive as to violate the Due Process Clause are not required to apply all relevant factors set forth in *Haslip*. Indeed, South Carolina appellate courts apparently are not required to apply *any* of those factors. Rather, in *Gamble, supra,* the South Carolina Supreme Court held that in order to comply with the requirements of *Haslip,* trial courts must conduct a post-trial review of a jury's punitive damages award and "may" consider a number of enumerated factors in doing so. 406 S.E.2d at 354.[6] However, appellate review of the trial court's

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'financial position' of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U.S. at 21-22 (paraphrasing *Hornsby*).

[6] Those factors are: "(1) defendant's degree of culpability; (2) duration of the conduct; (3) defendant's awareness or con-

determination is "limited." *Id.* at 355. "Only when the trial court's discretion is abused, amounting to an error of law, does it become the duty of this Court to set aside the award." *Id.* (citation omitted). Although this formulation does not make clear exactly what factors appellate courts are to consider in reviewing punitive damages awards, it is clear that appellate review in South Carolina falls far short of the procedures that this Court approved in *Haslip*.

First, it appears that South Carolina appellate courts are in fact not required to consider any of the factors set forth in *Gamble*. Certainly, South Carolina trial courts are not required to consider those factors. See *Gamble*, 406 S.E.2d at 354 (trial courts "may" consider those factors); *Weir v. Citicorp Nat'l Services, Inc.*, 435 S.E.2d 864, 869 (S.C. 1993) ("*Gamble* specifically states the trial court *may* consider the factors. Under *Gamble*, the trial court is not required to make findings of fact for *each* factor"). And if consideration of these factors is optional for trial courts, then it seems reasonable to presume that consideration of these factors is also optional for appellate courts, whose power of review is more "limited" than that of trial courts. *Gamble*, 406 S.E.2d at 355.

Second, even assuming, *arguendo*, that South Carolina appellate courts are required to consider the factors listed in *Gamble* when reviewing punitive damages awards for excessiveness, those factors do not include a number of important criteria mentioned in *Haslip*. *Gamble* does not require reviewing courts to consider the size of awards allowed in similar cases, although that is important infor-

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cealment; (4) the existence of similar past conduct; (5) likelihood the award will deter the defendant or others from like conduct; (6) whether the award is reasonably related to the harm likely to result from such conduct; (7) defendant's ability to pay; and finally, (8) as noted in *Haslip*, 'other factors' deemed appropriate." 406 S.E.2d at 354.

mation that the jury making the award will not have.[7] Nor does *Gamble* require reviewing courts to consider the degree to which the defendant has previously been punished for the same conduct, although doing so is obviously an important safeguard against multiple and excessive punishment for the same conduct.[8]

In the absence of meaningful appellate review in South Carolina, many defendants—such as ACLI members operating in South Carolina—face deprivation of the due process rights recognized in *Haslip*. Indeed, review of the post-*Gamble* cases in which South Carolina appellate courts have entertained challenges to the size of punitive damages awards suggests that their review is largely standardless. Most of the cases (including the South Carolina Court of Appeals' decision in the present case) do no more than state in a conclusory fashion that the award was not "excessive" or that the trial court did not commit "error" in its review of the award. *See Gamble*, 406 S.E.2d at 355 ($87,500 punitive damages award) (holding that the award was not "excessive" and that the defendant's conduct "could well have been considered by the jury to be reprehensible"); *Kinard v. Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) ($444,000 punitive damages award) (holding that the award "was amply supported by the evidence of record" and not "excessive"); *Weir*, 435 S.E.2d at 869 ($500,000 punitive damages award, remitted by trial court to $275,000) (holding that the award was not "grossly excessive, especially in light of [the defendant's] net value" and that "after carefully

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[7] As noted in *Haslip*, the Alabama Supreme Court does make such an analysis. *See* 499 U.S. at 21; *Aetna Life Ins. Co. v. Lavoie*, 505 So.2d 1050, 1053 (Ala. 1987).

[8] The Alabama Supreme Court, as indicated in *Haslip*, considers "the imposition of criminal sanctions on the defendant for its conduct, these to be taken in mitigation" and "the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation." 499 U.S. at 22.

reviewing the record, we find no error in the trial judge's review of the punitive award"); *Washington v. Whitaker,* 451 S.E.2d 894, 898 (S.C. 1994) ($225,000 punitive damages award) (holding that "the punitive damage award against [a defendant] was not unduly excessive or against the weight of the evidence"); *Constant v. Spartanburg Steel Prod.,* 447 S.E.2d 194, 197 (S.C.), *cert. denied,* 115 S. Ct. 580 (1994) ($100,000 punitive damages award) (finding that the verdict was not "grossly excessive"); *McCourt v. Abernathy,* 457 S.E.2d 603, 608 (S.C. 1995) (punitive damages awards of $1 million against one defendant and $500,000 against the other) (finding "no abuse of the trial judge's discretion" and "no error"); *Caldwell v. K-Mart Corp.,* 410 S.E.2d 21, 25 (S.C. Ct. App. 1991) ($100,000 punitive damages award) (award was not "grossly excessive"); *Hansel v. National States Ins. Co.,* 437 S.E.2d 159, 162 (S.C. Ct. App. 1993) (amount of punitive damages award not stated) ("We conclude the review conducted [by the trial court] in this case fulfills the requirements of *Gamble*"); *Perry v. Green,* 437 S.E.2d 150, 153 (S.C. Ct. App. 1993) ($50,000 punitive damages award) (finding "no abuse of discretion" because there was "ample evidence in the record to support the jury's verdict"); *Hendrix v. Eastern Distribution, Inc.,* 446 S.E.2d 440, 448 & n.5 (S.C. Ct. App. 1994) ($150,000 punitive damages award) (holding that there was "no abuse of discretion in this case" and noting that the punitive damages award apparently represented the jury's attempt to punish the defendant by removing the profits that it had made as a result of its unlawful conduct); *Orangeburg Sausage Co. v. Cincinnati Ins. Co.,* 450 S.E.2d 66, 73 (S.C. Ct. App. 1994) ("After carefully reviewing the record, we agree with the trial court's analysis").

As a result, South Carolina appellate courts do not appear to be providing the kind of meaningful appellate review envisioned by this Court in *Haslip.* In *Haslip,* the

Court took pains to emphasize that "postverdict review by the Alabama Supreme Court has resulted in reduction of punitive awards." 499 U.S. at 22. But ACLI has been unable to find a single case, decided since *Gamble*, in which a South Carolina appellate court reversed or otherwise disturbed a punitive damages award on the grounds that it was excessive.[9]

Nor is this problem confined to South Carolina. Courts in a number of other states have also interpreted *Haslip* to permit standards of appellate review that seem to fall well short of the standards required by *Haslip*. *See, e.g., Hospital Auth. of Gwinnett County v. Jones*, 409 S.E.2d 501, 503-504 (Ga. 1991) (refusing to consider either the defendant's financial position or the profitability of the wrongful conduct and adding that punitive damages comport with due process because of their "historical acceptance," not because they "can be accurately measured and adjusted by court imposed guidelines"), *cert. denied*, 502 U.S. 1096 (1992); *Ivy v. General Motors Acceptance Corp.*, 612 So.2d 1108, 1116 (Miss. 1992) (reaffirming a prior decision which did not require reviewing courts to consider any specific or measurable factors other than the defendant's wealth and ability to pay);[10] *Rodebush v.*

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[9] *See* the cases discussed in the preceding paragraph.

[10] *Ivy* reaffirmed the Mississippi Supreme Court's pre-*Haslip* decision in *Andrew Jackson Life Ins. Co. v. Williams*, 566 So.2d 1172, 1190 (Miss. 1990), where that court announced that the "quantum" of a punitive damages award is measured by considering the following "general" factors:

> First, the amount awarded should serve to punish the [defendant] and to deter it from committing similar offenses in the future. Second, the amount should serve as an example set to deter others from committing similar offenses. Third, the amount awarded should account for the [defendant's] pecuniary ability and financial worth. And fourth, the amount constitutes compensation for the plaintiff for his or her "public service" in bringing the action.

Clearly, these factors fall far short of the "detailed substantive standards" approved by the Court in *Haslip*. With the exception

Oklahoma Nursing Homes, Ltd., 867 P.2d 1241, 1251 (Okla. 1993) (list of factors to be considered does not include the size of awards allowed in similar cases or the degree to which the defendant has previously been punished for the same conduct); *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs. Inc.*, 596 A.2d 687, 708-710 (Md. Ct. Spec. App. 1991) (same).[11]

Only this Court can resolve the questions that have arisen since *Haslip* was decided and make clear, once and for all, what factors appellate courts must consider, at a minimum, in order to comply with the Due Process Clause.

CONCLUSION

The petition for certiorari should be granted.

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of the factor relating to the defendant's wealth, they are wholly conclusory in nature and fail to provide objective, measurable guidelines for determining excessiveness. Particularly noteworthy is the absence of any requirement that there be a reasonable relationship between the punitive damages award and the harm that has resulted or was likely to result from the defendant's conduct.

[11] Indeed, the Court of Special Appeals "carefully eschew[ed] any desire, or need, to engage in" an analysis of the awards rendered in other cases. 596 A.2d at 711.

SEP 6 1995

No. 95-223

In The

Supreme Court of the United States

October Term, 1995

CINCINNATI INSURANCE CO.,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

Petition For Writ Of Certiorari To The South Carolina Court Of Appeals

MOTION FOR LEAVE TO FILE A BRIEF FOR THE SOUTH CAROLINA DEFENSE TRIAL ATTORNEYS ASSOCIATION AS AMICUS CURIAE AND BRIEF IN SUPPORT OF THE PETITION

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The South Carolina Defense Trial Attorneys Association hereby moves, pursuant to rule 37.2 of the Rules of this Court, for leave to file the attached brief as *amicus curiae*. Counsel for the Petitioner has consented to the filing of this brief; counsel for the Respondent has refused to consent.

The South Carolina Defense Trial Attorneys Association is an organization of attorneys in South Carolina who practice on behalf of insurance companies and other defendants and consists of almost a thousand members. Virtually all attorneys who practice civil defense litigation are members of the organization.

Defining the procedural and substantive limitations that the due process clause of the Fourteenth Amendment imposes on punitive damages is an issue of vital importance to the defense attorneys and their clients. Without meaningful standards and a rational plan of review, punitive damage awards are haphazard and the chance of such an award being the result of passion and prejudice is high. In the present case, not only have meaningful standards of review been ignored, but, as will be discussed, the decision itself represents the promulgation of review criteria which would be extremely prejudicial to wealthy defendants and would essentially make the defense of punitive damage allegations difficult, if not impossible. The criteria applied by the court are both irrational and prejudicial.

The defense attorneys have a particular interest in the questions presented by the Petition for Certiorari in this case in that without guidance regarding the kind of review that appellate courts must provide in deciding

whether a jury's award of punitive damages is constitutionally excessive, then awards such as the one in this case are inevitable. The present case provides the potential for findings which are so nebulous and so irrational that the possibility of a punitive damage award being influenced solely by passion and prejudice is not only possible, but in view of the criteria espoused by the appellate court of South Carolina would be likely.

For these reasons, the Court should grant this motion for leave to file the attached brief *amicus curiae* in support of the Petition for Certiorari.

Respectfully submitted,

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No. 95-223

In The

Supreme Court of the United States

October Term, 1995

CINCINNATI INSURANCE CO.,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

Petition For Writ Of Certiorari
To The South Carolina Court Of Appeals

BRIEF OF AMICUS CURIAE IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

QUESTIONS PRESENTED FOR REVIEW

Whether it comports with due process to allow punitive damages to be awarded based on "evidence" related solely to a plaintiff's unelected cause of action not before the court.

Whether it comports with due process for the trial and appellate courts to conduct post-trial reviews of a punitive damages award that do not adhere to the requirements established by this Court.

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I. INTEREST OF THE AMICUS CURIAE

The South Carolina Defense Trial Attorneys Association seeks permission to appear and argue as to the matters raised in the appeal of this case as amicus curiae. Petitioner has consented to our appearance as amicus but Respondent has not.

The South Carolina Defense Trial Attorneys Association is comprised of trial attorneys who practice extensively in the defense of civil lawsuits, often on behalf of insurance companies and their insureds. It is a statewide association consisting of 844 members. Although the organization advocates on behalf of insurance companies and the defendants in civil actions, its charter requires that it seek to "elevate the standards of trial practice . . . and promote improvements in the administration of justice" not only on behalf of members, but for "the community, state and nation."

Our By-Laws do not permit us to participate as amicus unless the issue is one of general and urgent importance to the association and the insurance defense community and the underlying case creates precedent that could work a substantial injustice.

Absent a meaningful scrutiny by the trial court and review by an appellate court, punitive damage awards may be made based on passion and prejudice. By their nature, punitive damage awards are awarded as the result of a jury's dislike of a defendant or its alleged practices. The excesses and irrationality which can accompany a jury's decision are real threats to our civil justice system. Insurance companies, whose decisions can

adversely affect insureds, are particularly at risk for such prejudice.

For years, decisions regarding punitive damage awards in South Carolina were left almost exclusively to the discretion of the trial jury. Recent United States Supreme Court decisions have required a more meaningful review. Although the South Carolina Supreme Court has attempted to conform South Carolina's system of review of punitive damages to the mandates of this Court, it has failed in its attempt, both in form and substance.

The *OSCO* decision represents a trial and appellate court "review" of punitive damages, consisting of merely a determination that the overall conduct of the insurance company was egregious enough to justify strong reproach. The only review given the punitive damage award in the *OSCO* decision is related to the insurer's ability to pay and the ratio between actual and punitive damages. In addition to this inadequate review, the trial and appellate courts improperly sustained the punitive damages award by referencing allegedly "bad conduct" by the defendant which was unrelated to the elected jury verdict. The trial and appellate courts sustained a verdict of actual damages on the basis of plaintiff's elected cause of action of negligent procurement of an insurance contract, which involved an independent insurance agent's failure to obtain the proper policy for the insured. However, the trial and appellate courts improperly upheld punitive damages on the basis of plaintiff's unelected cause of action for bad faith which involved alleged improper claims handling. In such a circumstance, a punitive damages award cannot be sustained since the

"facts" which underlie the decision are not sustained by the elected jury verdict.

II. SUMMARY OF ARGUMENT

The South Carolina Court of Appeals' appellate review of punitive damages in the *OSCO* decision ignores the principles enumerated by this Court in *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1 (1991) and its progeny. The scrutiny of the trial court and the appellate review did not ensure that the award was reasonable and rational. Instead, the award was sustained on the basis of testimony which was not related to issues and on the basis of "evidence" which was not before the *OSCO* Court. The testimony and evidence relied upon by the *OSCO* Court were related only to plaintiff's unelected cause of action for bad faith improper claims handling. The use of such irrelevant evidence demonstrates passion and prejudice in the review process itself.

At the close of the actual damages phase of the trial, plaintiff made his election, electing the cause of action of negligent procurement of the policy. No evidence was presented by either party in the punitive damages phase of the trial which showed any reckless conduct by defendants. No evidence of recklessness by defendants had been introduced relative to the negligent procurement cause of action. Despite this lack of evidence, punitive damages were sustained. The punitive damage award rested on facts relating to the processing of the plaintiff's insurance claim, an irrelevant and mutually exclusive consideration at the punitive damages stage of the trial. The decision thereby effectively prevents defendants

from being able to confront the evidence against them as to punitive damages since the trial court scrutiny and appellate review mandated by the *OSCO* opinion not only permitted, but justified, extraneous, irrelevant and prejudicial criteria for the award of such damages.

In addition, the Court of Appeals' decision punishes insurance companies for relying on written policy provisions, and permits an award of punitive damages for simple negligence in the absence of willful or reckless conduct.

III. ARGUMENT

A. The *OSCO* decision denies a defendant due process rights by requiring it to respond to inadmissible and unelected accusations in the punitive damages phase of a trial.

Cincinnati Insurance Company was found liable and assessed actual damages for the negligent failure to procure an insurance policy with certain coverage limits. (R. at 36-37, 45-46, 828). Under existing South Carolina law, Cincinnati would also be liable for punitive damages if the failure to obtain the desired limits was reckless, willful or wanton. *Scott by McClure v. Fruehauf Corp.*, 396 S.E.2d 354 (S.C. 1990). The award of punitive damages would then be limited by the degree to which Cincinnati was reckless in the failure to procure a policy with those limits. *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). Such an award would have to be justified on the basis of recklessness as to the tort for which Cincinnati was found liable and limited by the degree of that recklessness.

In *OSCO*, the South Carolina Court of Appeals justified its finding of recklessness on the basis of a different cause of action than the one establishing liability. The *OSCO* Court improperly evaluated the egregiousness of Cincinnati's alleged recklessness by reviewing and relying on actions by Cincinnati which were unrelated and irrelevant to the cause of action giving rise to liability for actual damages.

While the point at which to require an election of causes of action is usually left to the discretion of the trial court, the delay in requiring an election until after all evidence has been heard on conflicting and mutually exclusive causes of action obviously created confusion and prejudice on the part of the jury, and this very prejudice became the rationale for the trial and appellate courts' sustaining of the verdict. Normally, a trial court would strictly admonish a jury to disregard irrelevant "facts" regarding an unelected cause of action in the punitive damages phase of the case. Here, however, it is the *OSCO* Court itself which relied upon irrelevant "facts" regarding an unelected cause of action to justify the punitive damage award. In this way, the court sustained the finding of liability on the basis of the elected cause of action and the punitive damages on the basis of the unelected cause of action. This is akin to finding a person guilty of jaywalking and innocent of murder, and then sentencing him to death.

There is no evidence of recklessness on the part of the agent in procuring the policy. None has ever been exposed in any of the arguments of counsel at trial (R. at 834-869, 871-874), nor in any of plaintiff's numerous briefs, nor in the oral findings at trial by the trial judge

(R. at 980-984), nor in the written opinion of the trial court, nor in the opinion of the South Carolina Court of Appeals. There is and can be no basis for such a finding. The only allegations of wrongdoing which have ever been cited which could lead to a finding of egregious conduct such as to support an award of punitive damages are conclusory statements drawn from irrelevant and contested evidence pertaining to an unelected cause of action. The reviewing court has no standing to make "findings of fact" where the "facts" do not pertain to the cause of action that is supposed to be before the Court. *Waldron v. Waldron,* 156 U.S. 361 (1895). (The trial court has the duty to correct an error arising from the erroneous admission of evidence).

Because the *OSCO* decision encourages the consideration of "evidence" of conduct outside the record of the case in assessing punitive awards, it is impossible to estimate punitive damage exposure or competently defend against such exposure. At a minimum, appellate courts have a duty to see that punitive awards are reasonable and fair based on the cause of action with which a given company is charged. To do less is to perpetuate prejudice and deny a litigant the right to know what conduct it will have to account for.

B. The *OSCO* decision represents an unreasonable and prejudicial approach to the review of punitive damage awards that is violative of due process protections.

The proper, and constitutionally required, standard of review of punitive damages awards was not adhered

to by the trial or appellate courts. Neither court considered or found any misconduct by the insurer relative to the findings of liability. The only considerations seriously addressed by the courts were the wealth of the insurance company and the ratio between actual and punitive damages. No other considerations were addressed. The "misconduct" that was considered should have been declared irrelevant, not the basis for an award.

Result-oriented decisions are dangerous. In this case, in order to sustain the actual damages awarded, the trial and appellate courts had to: (1) reverse longstanding law on the duty of an insured to read its policy; (2) find that an insured is justified in not recognizing or disclosing that his address and coverage limits are not correctly listed on the scheduled property on his declarations sheet and billing statements; (3) hold that the failure to read a policy and avail oneself of its terms by an insured – although a bar to a suit for intentional misrepresentation – is nonetheless not a bar for mere reckless omission; (4) permit "expert" testimony to the effect that no one really adheres to his legal obligations anyway; and (5) permit simultaneous findings of liability on separate causes of action which are stipulated to be mutually exclusive to stand.

Because of a delayed election of plaintiff's cause of action, the jury, the trial court and the appellate court were exposed to "evidence" which normally would have been totally excluded. This "evidence" became the sole basis for sustaining the punitive damages award so far as findings of misconduct are concerned.

Even with no objection, appellate courts have a duty to review a case so that punitive damage awards are reasonable and rational. But here, the trial court knowingly invited an election. The trial court was then requested to explain to the jury the effect on the evidence of such an election. Such an explanation is the clear duty of the court. The court declined to give a meaningful charge (or any charge) on the effect of the election, although the election was tantamount to a defense verdict on the unelected causes of action. The trial court then sustained the punitive damages award based on ***all*** the evidence. This error in conducting a meaningful review was repeated by the appellate court which not only adopted virtually verbatim all the opinions of the trial court but allowed plaintiff to claim as the record on appeal the entire trial transcript.

The trial court permitted evidence to be heard about mutually exclusive causes of action. The court was then requested to acknowledge that damages were to be limited to those relevant to the cause of action elected and to so advise the jury. The trial court refused to do this and then justified the jury's punitive damages award on the basis of "evidence" from the unelected causes of action. The appellate court in its review affirmed this process. In so doing, both the trial and appellate courts abrogated their duty to appropriately review the award of punitive damages.

IV. CONCLUSION

For these reasons, the South Carolina Defense Trial Attorneys Association respectfully requests that this Court grant the Petition of Certiorari.

Respectfully submitted this 6th day of September, 1995.

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NO. 95-223

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

V.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. Whether Cincinnati waived its due process challenges to the jury's actual and punitive damage awards because it failed to present the issues to the courts of South Carolina in a timely and proper manner.

II. Whether a due process issue is presented by Cincinnati's contention that post-trial review of a punitive damage award is meaningful only if conducted by an appellate court rather than a trial court.

III. Whether petitioner's due process challenges to the actual and punitive damage awards collapse when the theory of liability submitted to the jury is properly construed.

IV. Whether any federal constitutional issue is presented by Cincinnati's litany of complaints about South Carolina procedural and evidentiary law or challenges to the sufficiency of the evidence to support the verdict.

PARTIES TO PROCEEDINGS

Pursuant to Rule 29.1 of the Rules of this Court, respondent states that it is a closely-held corporation with no parent or subsidiary.

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No. 95-223

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

CINCINNATI INSURANCE COMPANY, *Petitioner,*

v.

ORANGEBURG SAUSAGE COMPANY, *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE SOUTH CAROLINA COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Orangeburg Sausage Company, respectfully requests that the Court deny the Petition for a Writ of Certiorari of Petitioner, Cincinnati Insurance Company.

STATEMENT OF THE CASE

This case arises out of Cincinnati Insurance Company's negligence and its bad-faith failure to pay an insurance claim. Orangeburg Sausage Company (Osco) engages in the manufacture of sausage and the storage, transportation and sale of packaged food stuffs, primarily to schools. In 1989, Hurricane Hugo damaged Osco's buildings, and water which was blown into Osco's freezer building damaged the packaged food stuffs stored there. The total damage to Osco's property, real and personal, amounted to $254,029.23. Osco believed it was insured for this loss under a policy issued by Cincinnati Insurance Company (Cincinnati) and sold to Osco by Cincinnati's agent, Bryant.

Osco had obtained a five-year policy from Cincinnati in 1983. R. 359, 991. In 1986 Osco asked Bryant to increase the insurance coverage on its personal and other property. Cincinnati issued a policy with the requested,

higher limits. R. 1065. In 1988, Osco renewed the policy for one year, with no request for changes in coverage. R. 358, 1068. After Osco suffered substantial damage from Hurricane Hugo, it filed a claim for the freezer contents. Cincinnati denied payment under the policy because the 1988 policy listed an incorrect and non-existent address as well as Osco's correct address.[1] R. 332.

Cincinnati insisted that Osco's food stuffs were stored at the non-existent 488 High Street address, and therefore Osco was entitled only to $30,000 in coverage for the personal property stored in its freezer building. R. 328-331. At the time Cincinnati refused to pay, one of its

---

[1] Osco's address is, and always has been, 597 High Street, Orangeburg, South Carolina. When Osco renewed its policy in 1988, Bryant, in an application signed by him but not by Osco, allocated $230,000 in personal property coverage to 597 High Street, and for an unexplained reason, allocated $30,000 in personal property coverage to an address he called 488 High Street. R. 332-333. There is not, and never has been, any such address. Osco never saw the application. R. 298-299, 366.

adjusters had made a written determination that the loss of the freezer contents was covered and had increased Cincinnati's reserves to cover it. R. 319-322. Also, Cincinnati refused for more than eight months to pay the undisputed claim for Osco's real property damage. When Cincinnati finally offered payment on the undisputed elements of damage, it demanded in exchange a concession that there was such an address as 488 High Street. R. 326-329.

Eventually, Osco sued Cincinnati for reformation of contract, breach of contract, bad faith refusal to pay and negligence, and sued Bryant for negligence. The trial was bifurcated. Liability and actual damages were tried first, followed by a trial of the punitive damages issue.

As a result of Cincinnati's refusal to pay its claims, Osco had been unable to replace its inventory. When its customers called for service, Osco was unable to provide them with packaged foods, and over a period of time lost

a number of customers. R. 451. An economist testified that the total actual damages suffered by Osco were $595,216 up to the time of trial. Osco's present and principal shareholder testified that he believed the business had lost as much as $750,000. R. 455.

Pursuant to South Carolina procedure, which Cincinnati does not challenge, the jury was allowed to consider Osco's contract action, as well as its two tort actions. The jury returned a verdict for Osco in the amount of $800,000 on its negligence claim, $250,000 on its bad faith claim, and $254,029.23 on the breach of contract claim. The trial judge asked Osco to elect between its negligence and contract claims, and Osco elected negligence. R. 937-38, 945-46. The trial judge found the verdict on the negligence theory of liability to be excessive, albeit not the result of caprice, passion, or prejudice, and ordered a reduction of the actual damages to $595,216. R. 204. That reduction was accepted by Osco.

In the second phase of the bifurcated proceeding, the court then allowed both sides the opportunity to present evidence on the issue of punitive damages. Osco presented an economist who analyzed for the jury Cincinnati's financial statements on file with the South Carolina Department of Insurance. This economist answered just thirteen questions from Osco's counsel and one from Cincinnati's counsel. Cincinnati offered no evidence on the issue of punitive damages. The jury awarded $1,630,000 in punitive damages, roughly twice the actual damages they had awarded, in a sum which amounted to .003 percent of Cincinnati's net worth. R. 13.

The punitive damage award was scrutinized by the trial court in light of South Carolina's requirement for post-trial review pursuant to *Gamble v. Stevenson,* 305 S.C. 104, 406 S.E.2d 350 (1991). R. 980-985. The South Carolina Court of Appeals, South Carolina's intermediate

appellate court, then reviewed the trial judge's findings and affirmed the judgment for actual and punitive damages.

SUMMARY OF ARGUMENT

Petitioner's attempt to cast its argument in constitutional terms is belated, as the due process claims asserted in the Petition were not raised or preserved, if at all, with any degree of specificity in the trial or appellate courts of South Carolina. Only one of the eight issues asserted in the Petition was raised in the trial court, i.e., that the procedure dictated by the Supreme Court of South Carolina in *Gamble* does not satisfy the requirements imposed by this Court in *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. 1 (1991). Cincinnati first articulated that due process claim only after trial, not before or during trial. Cincinnati failed to preserve that issue in the trial and appellate courts of South Carolina. Even if the issue had been preserved, Cincinnati's contention that South Carolina lacks adequate procedures

for post-trial review of punitive damages is without merit because the South Carolina trial court's scrutiny mirrors the Alabama Supreme Court procedure approved by this Court in *Haslip*.

The issues presented in the Petition are a veiled attack upon the substantive law of South Carolina and the sufficiency of evidence to support the verdict. Osco respectfully submits that the South Carolina Court of Appeals correctly decided these issues, but even if it erred, the Petition raises no significant issue of federal constitutional law which warrants this Court's review. Rather, the Petition is one last attempt by Cincinnati to justify its callous disregard of the rights of its insured. In furtherance of its pattern of denying responsibility for its negligence and bad faith towards Osco, Cincinnati has ignored the substantial evidence in the record which supports the jury's award of actual and punitive damages.

This Court should deny Cincinnati's Petition for review of these state tort and evidentiary issues.

REASONS FOR DENYING PETITION

I. Cincinnati waived its due process challenges to the jury's actual and punitive damage awards because it failed to present the issues to the courts of South Carolina in a timely and proper manner.

Petitioner's federal questions were not timely and properly raised in the courts below. The citations to the Record on page 29 of the Petition do not specify as required by Rule 14.1(h) the information necessary to demonstrate that the federal questions presented in the Petition were raised, passed upon and preserved. To the contrary, the pages cited by petitioner in its statement of the case indicate that Cincinnati asserted a denial of due process only in the most general of terms. For example, R. 975-976 contains a reference to the "14th and 16th Amendments" to the Constitution but no reference to due process, much less any specificity that would have apprised

the trial court of the nature of Cincinnati's due process claim.

Of 50 grounds advanced by Cincinnati in its Motion for Judgment Notwithstanding the Verdict or in the Alternative for a New Trial, only one, number 12, mentions due process. That ground states, "An award of punitive damages under South Carolina law is violative of the Defendant Cincinnati's due process rights as provided by the United States and South Carolina Constitutions." R. 63. In its argument under that heading in the memorandum which accompanied that motion, Cincinnati addressed only an allegation that the Supreme Court of South Carolina in *Gamble* had failed to adopt any meaningful appellate court review of punitive damages. R. 87-91. When the trial court failed to address this issue in its order on post-trial motions, Cincinnati failed to raise this issue in its motion for reconsideration under South Carolina Rules of Civil Procedure 59(e). R. 158-161. Under South Carolina

procedural law, a 59(e) motion is required to preserve for appeal any issue not addressed by the trial court. *Goddard v. Fairways Development General Partnership*, 310 S.C. 408, 412, 426 S.E.2d 828, 831 (Ct. App. 1993). Accordingly, this issue was waived in the trial court.

On appeal to the Supreme Court of South Carolina, in its statement of issues on appeal, Cincinnati again addressed due process under the federal constitution in only one of its grounds for reversal. Again, that argument was directed solely at whether South Carolina had complied with this Court's ruling in *Haslip*, 499 U.S. 1 (1991), with regard to post-trial review of punitive damages awards. That attempt to resurrect the constitutional question, i.e., whether such review must be conducted by an appellate court, was waived in oral argument by Cincinnati's counsel before the South Carolina Court of Appeals. In response to questioning by the court about whether the issue had been raised at trial, Cincinnati's counsel conceded that the

essence of Cincinnati's argument was its contention that the record contained no evidence to support the punitive damage award, rather than the lack of a sufficient appellate review procedure.

> Judge Goolsby: Mr. Sweeny, on Page 27 of your brief --
>
> * * *
>
> -- it raised an issue regarding the constitutionality of the review procedure by an appellate court, do you not?
>
> Mr. Sweeny: Yes, sir, I do.
>
> Judge Goolsby: Was that argument raised and ruled on by the trial judge?
>
> * * *
>
> Do you represent to us that this argument that you have on Page 27 and the following pages of your brief concerning appellate review was raised and ruled on?
>
> Mr. Sweeny: No, I do not.
>
> * * *
>
> Judge Goolsby: Do you understand my question, Mr. Sweeny?
>
> Mr. Sweeny: I'm not sure.

Judge Goolsby: You questioned the review procedure, as I read Question Number 3 on Page 27 of your brief. You questioned the constitutionality, the constitutional validity of appellate review. Do you not do that?

Mr. Sweeny: Yes, sir, I do.

Judge Goolsby: Did you raise that to the trial judge as a basis for your motion for a new trial and your motion for J.N.O.V.?

* * *

Mr. Sweeny: I raised that in my motion for a new trial, I believe.

Judge Goolsby: All right sir. Did he rule on it?

* * *

This very argument. See, you make a distinction in your brief about the Alabama Supreme Court having a different review than we have here in South Carolina, --

* * *

-- and in the *Gamble* case, there was no discussion of appellate review.

Mr. Sweeny: That's correct.

Judge Goolsby: And you seek to have these punitive damages thrown out on the basis that there's not any appellate review that has been constitutionally approved as in the *Haslip* case.

> Mr. Sweeny: Right. To be quite candid to you, the *Haslip* case has changed since I wrote this brief; and this is not the gist and has not been the focus of our attitude towards this case. We believe that there's no evidence of recklessness to begin with so that there's no showing upon which punitive damages could be awarded.
>
> * * *
>
> Judge Goolsby: Well, it just raises another issue; and that is the jurisdiction of the South Carolina Court of Appeals to address something on -- of a constitutional matter.
>
> Mr. Sweeny: Right. I see that now. But quite candidly, the focus of our appeal here is -- we just think that what took place in the lower court is just totally wrong in regard to the verdicts, both on the actual --
>
> Judge Goolsby: Well, that's a different issue than a constitutional one.
>
> Mr. Sweeny: I understand.

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993.

Cincinnati raised in the trial court no due process challenge on any of the other grounds it now cites in its Petition for a Writ of Certiorari. Therefore, those issues were not preserved either.

II. Cincinnati's contention that post-trial review of a punitive damage award is meaningful only if conducted by an appellate court rather than a trial court does not present a due process issue.

Cincinnati contends that the procedure approved by the Supreme Court of South Carolina in *Gamble* fails to impose "a sufficiently definite and meaningful constraint on the discretion of [South Carolina] factfinders" as required by this Court in *Haslip*, 499 U.S. at 22, because the review is conducted by the trial court rather than an appellate court. Even if it had been preserved, this issue does not warrant review.

Cincinnati does not challenge the sufficiency of the trial court's post-trial review of the punitive damage award, but only the judicial level at which the review was conducted. Cincinnati maintains that regardless of the degree of scrutiny conducted by the trial court, its due process rights have been violated because under the standard of review employed by the Supreme Court of

South Carolina, a punitive damage award will not be overturned absent an abuse of discretion by the trial court, *Gamble*, 305 S.C. at 112, 406 S.E.2d at 355, and therefore no "meaningful" appellate review exists.

Cincinnati has articulated no reason why a trial court in South Carolina following the *Gamble* procedure does not provide the constitutionally required restraint on the jury's discretion as does the Alabama Supreme Court's procedure approved in *Haslip*.[2] Nor has Cincinnati asserted that the trial court's scrutiny failed to comply with the requirements of *Gamble*. Osco submits that the trial court's post-trial inquiry pursuant to *Gamble* met the requirements of due

---

[2] Cincinnati fails to cite *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (CA4 1991), a diversity case arising under South Carolina law in which the Fourth Circuit Court of Appeals reviewed the procedure outlined in *Gamble*. The Fourth Circuit determined that the post-trial review procedure mandated by *Gamble* satisfies the requirements of due process because the procedures mandated by the Supreme Court of South Carolina to be performed "by trial courts in South Carolina will parrot the review conducted by the Alabama Supreme Court as described in *Haslip*." 947 F.2d at 109.

process as articulated by this Court in *Haslip*. The South Carolina Court of Appeals reviewed the record, found no abuse of discretion, and correctly affirmed the jury's award. Cincinnati has not been denied due process by this procedure.

III. Petitioner's due process challenges to the actual and punitive damage awards collapse under a proper construction of the theory of liability submitted to the jury.

Cincinnati argues that its due process rights were violated by the imposition of punitive damages based upon a cause of action not elected by Osco. The South Carolina Court of Appeals found that Cincinnati failed to preserve this issue for appeal because Cincinnati failed to take exception to the Court's charge on this point. App. 35-36. But, even if preserved, Cincinnati's disagreement with the South Carolina Court of Appeals about the nature of the plaintiff's tort claim and what evidence is relevant to it for

punitive damages purposes does not give rise to any federal constitutional question.

Osco filed this lawsuit alleging theories of breach of contract, negligence, bad faith, and in the alternative, reformation of the contract. Cincinnati has repeatedly argued that the trial court required an election of remedies between the bad faith and negligence causes of action. Petition at 23, 35, 40. That assertion is erroneous. Prior to the jury verdict, the only election requested by Cincinnati was an election between the equitable claim (reformation of contract) to be tried by the court and the legal claims to be tried by the jury. R. 241-245.

The "election" after the jury's verdict on actual damages was not an election in the sense of the previous motions, at all. South Carolina law and procedure, which petitioner does not challenge, allows the trial court, in a bad faith action, to present both tort and contract actions to the jury. App. 27-28. The plaintiff, however, must

choose a theory on which to collect damages to avoid "double dipping." The court asked Osco to elect between negligence and contract, and Osco chose to collect on the negligence cause of action. R. 937-938, 945-946. However, that "election" did not obviate the jury's verdict on the other theories of liability. The jury had found Cincinnati guilty of bad faith and negligence and found wilfulness, recklessness or wantonness with respect to both. R. 36-37. After this "election," the court made it clear that both the negligence and the bad faith claims were still in the case and that the jury could consider both tort claims on the punitive damage issue. R. 956-959.

Cincinnati disagrees with the conclusions of the trial court and the South Carolina Court of Appeals. To support its position, Cincinnati quotes the complaint in its Petition. However, the pleadings did not go to the jury. R. 880. What went to the jury was the evidence presented and the law applicable thereto as contained in the charge.

Cincinnati repeatedly refers to a "stipulation" about the nature of the negligence claim. No stipulation occurred, however. Cincinnati has taken out of context a few lines in a long colloquy between counsel and the court. The colloquy resulted in a charge to the jury on a negligence claim against Cincinnati that was not solely derivative of Bryant's negligence. The particulars under the negligence action, as submitted to the jury, were: "[B]y writing an incorrect address into the insurance policy, by changing the insurance policy without notice to Osco, and by producing an insurance policy which failed to meet Osco's stated request for coverage while leading Osco to believe that those needs were covered." R. 889. Neither the court nor counsel believed that an election was being made to ignore the misconduct of the insurance company under the bad faith theory.

Cincinnati's argument that its due process rights were violated because the award of punitive damages is based

solely upon its vicarious liability for acts of its agent is wrong legally and factually. In *Haslip*, this Court approved an award of punitive damages on the vicarious liability theory of *respondeat superior*. 499 U.S. at 15. Moreover, Cincinnati's argument proceeds from the erroneous premise that the record contains no evidence of Cincinnati's independent negligence. The trial court and the South Carolina Court of Appeals addressed this issue and found sufficient independent evidence of Cincinnati's recklessness and wilfulness to justify the award of punitive damages. App. 21-23, 56-57.

Osco proved that Cincinnati negligently produced a policy with a patently erroneous address and then used the result of its negligence (the policy with the wrong address) as a basis for refusing to pay Osco's claim, denying for months even payment on the undisputed portion of the claim. The jury found that Cincinnati acted not only negligently, but also recklessly, wilfully, wantonly, or in

conscious disregard of Osco's rights. R. 36. The South Carolina Court of Appeals concluded that "[j]ust as Cincinnati's handling of the claim was relevant to Osco's actual damages under its negligent procurement claim, it was also relevant to the award of punitive damages . . . ." App. 38 (footnote omitted). Osco submits this conclusion is correct.

IV. No federal constitutional issue is presented by Cincinnati's complaints about South Carolina procedural and evidentiary law or in Cincinnati's challenge to sufficiency of the evidence to support the verdict.

Cincinnati's claim that the admissibility of certain evidence in the punitive damages phase violates due process is meritless. The trial court and the South Carolina Court of Appeals found that Cincinnati had waived all but one of its objections to the punitive damages evidence, i.e., the allegedly improper "formula." App. 26, 59. The South Carolina Court of Appeals went on to hold that the "formula" evidence was not improper because Cincinnati's

daily earnings are clearly relevant to its ability to pay. App. 26-27. Further, no prejudice appears from the admission of such evidence, as the award was far less than Cincinnati's daily earnings and insignificant compared to its net worth. App. 23.

Cincinnati's claim that the record contains no evidence of recklessness or wilfulness in regard to Cincinnati's negligence simply represents a disagreement with the trial court and the South Carolina Court of Appeals about the nature of the wrong done to Osco and the kinds of evidence probative of whether the wrong was committed wilfully or recklessly. This contention involves purely matters of state tort and evidence law which have been reviewed and decided adverse to Cincinnati's position.

The South Carolina Court of Appeals found evidence in the record sufficient to support the jury's finding that Cincinnati was negligent and then engaged in a series of acts to obfuscate, confuse and mislead the insured from

discovering Cincinnati's negligence. Its decision recites a number of wilful, callous and intentional acts of Cincinnati sufficient to support the award of punitive damages. App. 9-11, 21-23. The South Carolina Court of Appeals held that Cincinnati's handling of the claim was relevant to the issue of punitive damages on Osco's negligence claim. App. 38. Cincinnati's disagreement with the South Carolina Court of Appeals on this point fails to raise any federal constitutional issue. Whether the South Carolina Court of Appeals made a mistake in applying South Carolina law or South Carolina rules of evidence is not a federal question.

Cincinnati's contention that the actual damages verdict indicates such a degree of passion, prejudice, caprice or bias that Cincinnati has been denied due process rights is similarly without merit. The South Carolina Court of Appeals held the verdicts on the three theories of liability submitted to the jury to be consistent rather than

inconsistent under South Carolina law. App. 27-28. Further, the trial court and the South Carolina Court of Appeals identified testimony in the record to support the jury's $800,000 award on the negligence claim. App. 29, 53. Even if the South Carolina Court of Appeals were wrong in these conclusions, the issue is not one of federal constitutional significance.

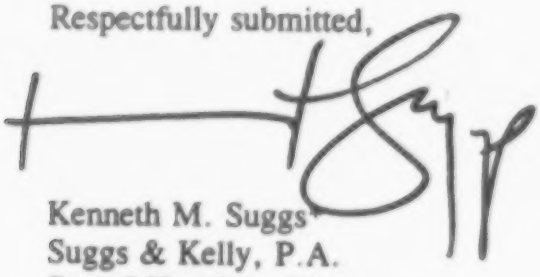
The only other basis for Cincinnati's challenge to the actual damage award is plaintiff's counsel's allegedly inflammatory jury argument. This argument was not made at trial and therefore has been waived. App. 31, 54, 69.

This is nothing more than an ordinary tort case. The punitive damages awarded to Osco as a result of Cincinnati's conduct was only twice the actual damages award and was only about .003 percent of the defendant's net worth. Cincinnati's complaints about the handling of the trial do not warrant review by this Court.

CONCLUSION

Cincinnati's Petition for a Writ of Certiorari should be denied.

Respectfully submitted,



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In The

Supreme Court of the United States

October Term, 1995

CINCINNATI INSURANCE COMPANY,

Petitioner,

v.

ORANGEBURG SAUSAGE COMPANY,

Respondent.

Petition For A Writ Of Certiorari To The South Carolina Court Of Appeals

REPLY BRIEF OF PETITIONER

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REPLY

I. RESPONDENT IS SIMPLY WRONG IN ASSERTING THAT PETITIONER DID NOT PRESERVE IN THE SOUTH CAROLINA COURTS THE ISSUES THAT IT HAS BROUGHT TO THIS COURT.

Petitioner has appealed to this Court on the grounds, *inter alia*, that the South Carolina Court of Appeals erred in holding that the award of punitive damages in this case met the requirements of due process. Respondent's Brief in Opposition states that Cincinnati waived its right to appeal on this issue by failing to present it to the State courts. OSCO's assertion is not truthful. As early as Cincinnati's Answer, the unconstitutionality of any punitive damages award was asserted. R. at 59. At oral argument before the South Carolina Court of Appeals, counsel for OSCO admitted to that court that *throughout the trial* Cincinnati had raised the constitutionality issue regarding the punitive damages. He responded, in pertinent part, to Judge Goolsby's question:

> Judge Goolsby: Was [the issue of the constitutionality of South Carolina appellate review of punitive damages] ever raised to the trial judge?
>
> Mr. Suggs: Throughout the trial the defendants kept saying "we want to preserve our constitutional objections on punitive damages."
>
> * * *
>
> They kept saying "we want to preserve all our constitutional objections to punitive damages. . . . "

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993.

Cincinnati has, in appealing to this Court, cited five different ways in which the punitive damage award in

this case constituted a deprivation of its rights to due process. They are designated as (a) through (e) of the Questions Presented in the Petition for a Writ of Certiorari. Each of them was presented to the courts of South Carolina.

Cincinnati's first point is that the trial court allowed punitive damages based on evidence relevant only to the unelected cause of action for bad faith. OSCO's counsel, in argument before the South Carolina Court of Appeals, admitted that, despite OSCO's election of the negligence cause of action, the trial court allowed the evidence of bad faith to go to the jury in the punitive damages phase. The colloquy between OSCO and the court was:

> Judge Cureton: My concern is whether or not all the damages relate to the negligence, and the negligent procurement. Especially on the punitive damages, there was a lot of testimony about the conduct of Cincinnati after the damage occurred. Could not a jury have awarded a lot of these punitives, a bulk of them, based on the conduct that occurred after the fact here?
>
> Mr. Suggs: The judge, in fact, sent the punitive damages to the jury based on all the conduct of Cincinnati Insurance Company and the agent. In other words, and there's a colloquy in the record before the punitive damages phase, where the judge indicated that just because we had elected to have *judgment* entered on the negligence cause, that didn't wipe out the *conduct* on the

bad faith cause (emphasis added).

Judge Cureton: Is that proper?

Mr. Suggs: I believe it is, your Honor.

Judge Goolsby: Was that issue raised?

Mr. Suggs: Well, then there was a colloquy about whether to do that or not. The judge said, well I'm gonna submit all the conduct to the jury on punitive damages.

* * *

Judge Goolsby: He was never requested to tell the jury to disregard all evidence relating to the claim on bad faith?

Mr. Suggs: He was requested before the charge to do that. . . . That issue was in the air before the jury charge.

Tape, oral argument, South Carolina Court of Appeals, October 4, 1993. This issue was, as Plaintiff's counsel admitted, presented to the trial court prior to the charge on punitive damages. R. at 955-960. This issue was also brought up in Cincinnati's post-trial motions, which the trial court permitted to be filed within ten days after the trial. R. at 68, 122. The trial court's Order Regarding Post-Trial Motions considered these motions, R. at 6, and denied them. Cincinnati cited this issue in its motion under Rule 59(e) to reconsider the judgment. R. at 160. Cincinnati thereafter cited and discussed this issue in its brief on appeal to the South Carolina appellate courts, Brief of Appellant at 39, and in its reply brief. Reply Brief of Appellant at 1-8. Cincinnati similarly put forth this issue in its petition to the South Carolina Supreme Court. Petition for Writ of Certiorari at 24-28. This issue has been consistently raised in the courts of South Carolina, OSCO's brief to the contrary notwithstanding.

Cincinnati's second objection that the process below deprived it of due process as regards the punitive damage award focuses on the amount of financial information presented about Cincinnati and the method of presentation. At trial, Cincinnati strongly objected to the introduction of this evidence before, during, and after its presentation. R. at 949-50, 953, 964-66. Cincinnati continued to recite its objections to the "wealth" evidence in its post-trial motions. R. at 78-9, 83, 90, 132. Cincinnati also pursued this issue in its appeal through the South Carolina appellate courts. Brief of Appellant at 29; Petition for Writ of Certiorari at 37, 43-44. This issue is clearly alive and well before this Court.

Cincinnati's third point of appeal to this Court is that Cincinnati is deprived of its due process rights by being targeted exclusively for punitive damages – because it was the deep-pocket, out-of-state corporation – by excusing the local agent from any liability for such damages even though he was stipulated to be the sole actual tortfeasor. Cincinnati objected to this invidious focusing at trial. R. at 950-51, 954-55. Such focusing generally was cited in Cincinnati's post-trial motions. R. at 132. It was put forth by Cincinnati in its appeal. Brief of Appellant at 26.

The fourth deficiency in due process regarding the punitive damage award stated by Cincinnati is that there was no evidence of recklessness or knowingly wrongful conduct by Cincinnati. This issue was also set forth in the trial court. R. at 939-40. An objection was made to any punitive damages hearing on this basis. R. at 950. The issue was stated again in Cincinnati's post-trial motions. R. at 79, 131-32, 135-36. Cincinnati maintained its pursuit of the issue to the State appellate courts. Brief of Appellant at 23, 26; Reply Brief of Appellant at 13-14. Cincinnati also put forth the issue in seeking review from the State Supreme Court. Petition for Certiorari at 30-32.

The fifth deficiency in due process that Cincinnati cites to this Court is that the South Carolina scheme for review of punitive damage awards does not meet the standards for due process established by this Court in

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991). Though this issue was perhaps not ripe for adjudication until the South Carolina Supreme Court had addressed this case, in an abundance of caution Cincinnati put forth the issue in its post-trial motions. R. at 63, 87-91. Cincinnati brought the issue to the attention of the appellate courts of South Carolina. Brief of Appellant at 27-28 (arguing, not generally, but specifically, that the South Carolina procedure for review of punitive damage awards did not comply with *Haslip*); Petition for a Writ of Certiorari at 35-40 (arguing specifically that the South Carolina scheme of punitive damages review, as set forth in *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991), was unconstitutional because it failed to comply with *Haslip*). When the issue was fully ripe for adjudication, i.e., when the South Carolina Supreme Court denied certiorari, Cincinnati presented it to this Court with a prayer for review.

The second major point that Cincinnati has presented in its Petition for Certiorari to this Court is that it was denied due process because the jury's verdict was the result of passion, caprice, and prejudice. That was presented to the trial court, R. at 940-41, and in the post-trial motions. R. at 62, 93-96. The issue of the influence of passion, caprice, and prejudice on the jury's verdict was also presented to the appellate courts. Brief of Appellant at 31-35; Reply Brief of Appellant at 15-17; Petition for Certiorari at 41-44.

It is ironic that OSCO would rely on excerpts from an unpublished and uncertified tape of the oral argument before the South Carolina Court of Appeals to stand for the proposition that Cincinnati somehow orally waived its arguments about the constitutionality of the punitive damage award when that tape as cited above clearly demonstrates OSCO's own acknowledgement that these were issues from the beginning that were "consistently" asserted by Petitioner. The one edited excerpt OSCO seeks to advance out of context concerns only an effort by counsel to redirect the attention of one of the justices to another matter which should have resulted in a reversal

of the entire verdict, and was done in the limited time restraints imposed on oral argument. At the time, no one – the court members nor any counsel – would have characterized this as a waiver. This is evidenced by Plaintiff's counsel's admissions and the further questioning of the court on this issue, all of which took place *after* OSCO now disingenuously says that a waiver took place. Indeed, the excerpts from the tape submitted above were also well after Plaintiff's edited excerpts. Further, the Court of Appeals decision itself clearly reflects that no oral waiver was made.

Based on Cincinnati's timely presentation of all its issues to the trial court, and its consistent reiteration of them to the appellate courts, these issues are preserved for review by this Court.

II. OSCO CONCEDES THAT THERE WAS NO MEANINGFUL APPELLATE REVIEW OF THE PUNITIVE DAMAGES AWARD, WHICH IS REQUIRED BY *HASLIP* TO MEET THE REQUIREMENTS OF DUE PROCESS.

OSCO in no way defends the thoroughness, acuity or objectivity – or any other quality that would make a review meaningful – of the review conducted by the South Carolina Court of Appeals. Since it tacitly recognizes that the court of appeals' review was not meaningful, OSCO has adopted the view that due process does not require appellate review.

The fact is that the review of punitive damages which was employed in this case was far less objective and rigorous than the procedure for review applied in *Haslip*. In that case, meaningful reviews were conducted at both the trial court and appellate court levels. This Court emphasized the availability and importance of the appellate review. It said:

> By its review of punitive awards, the Alabama Supreme Court provides an additional check on the jury's or trial court's discretion. It first

> undertakes a comparative analysis. [citation omitted]. It then applies the detailed substantive standards it has developed for evaluating punitive awards. In particular, it makes its review to ensure that the award does "not exceed an amount that will accomplish society's goals of punishment and deterrence." [citations omitted]. *This appellate review makes certain that punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition.*

Pacific Mut. Life Ins. Co. v. Haslip, 499 U.S. at 21 (emphasis added) (citations and footnote omitted).

The review in the case at hand was dramatically deficient when evaluated by the standards of *Haslip*. The limited appellate court review in this case focused heavily on the idea that the trial court had found the punitive damages to be "within reasonable limits," App. at 24, i.e., that it was "within proportions to the original actual award" and "easily within Cincinnati's ability to pay as it was only three/one-thousandths of Cincinnati's net worth." App. at 23.

In contrast to what the *Haslip* opinion observed about Alabama plaintiffs, 499 U.S. at 22, South Carolina plaintiffs do enjoy a windfall if they have a defendant with a deep pocket. The lack of any meaningful appellate review to act as a restraint on the jury's discretion deprives deep pocket defendants, especially from out of state, of due process. The "home-cooked justice" administered to Cincinnati here is an abject example of the pitfalls inherent in the South Carolina system.

III. OSCO'S ELECTION PRECLUDES AN AWARD OF PUNITIVE DAMAGES FOR BAD FAITH.

The very first sentence of OSCO's Statement of the Case in its Brief in Opposition states that "[t]his case arises out of Cincinnati Insurance Company's negligence and its bad faith failure to pay an insurance claim." This

statement is false. The cause of action elected was solely for negligence by the independent agent in procuring a policy of insurance. That cause of action made no mention of bad faith claims handling by adjusters. The statement only mocks the truth in that it is accurate to say that the damages awarded were actual damages for negligent procurement of the policy (the elected cause of action) and punitive damages for the unelected bad faith cause of action.

The differences in these causes of action are clearly identified in OSCO's Complaint. OSCO denies the importance of this by spuriously arguing that the Complaint did not go to the jury, as if to imply that since the jury did not physically possess the Complaint during its deliberations that OSCO must somehow not be bound by the Complaint's allegations. Respondent's Brief in Opposition at 19. Whether the Complaint went to the jury or not is absolutely irrelevant. The Complaint states the "charges" against the Defendant. When such charges seek punitive damages, they can be considered at least "quasi-criminal." *Smith v. Wade,* 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting) cited in *Haslip,* 111 S.Ct. at 1044.

The allegations of OSCO's Complaint make it clear that the cause of action for negligence and the cause of action for breach of contract and the accompanying bad faith are mutually exclusive of one another. The unelected breach of contract action was for Cincinnati Insurance Company's failure to pay OSCO's alleged freezer damages under the existing policy. The bad faith cause of action was stipulated by OSCO's counsel to be for Cincinnati Insurance Company's bad faith refusal to pay under the policy and was further stipulated to be derivative of the breach of contract action. R. at 925. All counsel and the trial court understood that the unelected bad faith cause of action required a finding of liability under the unelected breach of contract action.

The elected negligence cause of action was stipulated to be for independent agent Bryant's failure to obtain the policy OSCO says it wanted. It was further stipulated that

all acts of negligence under this theory were those of the agent and not of Cincinnati Insurance Company. R. at 828.

The allegations of the Complaint are entirely consistent with the stipulations made by OSCO's counsel. Those stipulations were made at the close of evidence to define succinctly the various mutually exclusive theories of recovery. The only possible confusion about this arises because bad faith can be the result of negligence.[1] But, the unelected bad faith alleged and pursued and the negligence elected were entirely different causes of action. To allow actual damages for one and punitive damages for the other is utter nonsense and a gross abridgement of Defendant's due process rights.

IV. RESPONDENT'S ASSERTIONS TO THE CONTRARY NOTWITHSTANDING, THE TRIAL COURT'S ERROR IN ALLOWING THE JURY TO AWARD PUNITIVE DAMAGES BASED ON IRRELEVANT EVIDENCE DEPRIVED CINCINNATI OF ITS CONSTITUTIONAL RIGHTS.

The Constitution provides a fundamental guarantee that citizens "may rest secure against arbitrary or irrational deprivations of property." *TXO Prod. Corp. v. Alliance Resources Corp.*, 113 S.Ct. 2711, 2725 (1993) (Kennedy, J. concurring in part). If a party is deprived of property on the basis of irrelevant evidence, that deprivation is arbitrary. If evidence is not limited to that relevant to the allegations at issue, no rational line can be drawn between admissible evidence and that properly excludable. There would not be an adequate determining principle for the admission of evidence; by definition, that would be arbitrary.

Allowing evidence of bad faith – when that cause of action had not been elected when such election was

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[1] The South Carolina Court of Appeals was not confused, however, and simply held that the unelected allegations of bad faith could be considered in awarding punitive damages.

required and when such bad faith claims depended upon the existence of an enforceable contract which OSCO had denied – was to allow irrelevant evidence. In its brief in opposition OSCO cites *no* relevant evidence that would justify the award of punitive damages on its negligence claim. In the absence thereof, OSCO makes up from whole cloth the statement that Cincinnati "engaged in a series of acts to obfuscate, confuse and mislead the insured from discovering Cincinnati's negligence." Respondent's Brief in Opposition at 23-24. This assertion is inserted with no reference to the record or to any holding of the trial or appeals courts. There is no such evidence and no such holding. OSCO's attempt to create something that has no genesis in fact highlights the absolute lack of actual evidence of any recklessness or willfulness connected to the negligence cause of action.

CONCLUSION

This Court should grant Cincinnati's Petition for a Writ of Certiorari to address the important due process issues raised by the award of punitive damages in this case.

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